Supreme Court, U.S.
FILED

No. (1)

93 1497 MAR 2 1 1994

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Supreme Court of the United States

October Term, 1993

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANAGEMENT CORPORATION and PITTCON PREINSULATED PIPES CORPORATION,

Petitioners,

against

ISMAIL ABOU-KHADRA, CONTRACTORS SERVICES ESTABLISHMENT and SAUDI PREINSULATED PIPES INDUSTRIES,

Respondents.

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANAGEMENT CORPORATION and PITTCON PREINSULATED PIPES CORPORATION,

Petitioners,

against

GEORGE T. MAHSHIE and TONY DEEB,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HANCOCK & ESTABROOK
Attorneys for Petitioners
MONY Tower I, P. O. Box 4976
Syracuse, NY 13221-4976
(315) 471-3151

DAVID E. PEEBLES
Of Counsel

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(S3851—1994)
Printed on Recycled Paper

134 pp

QUESTIONS PRESENTED

1. Is an innocent party who has suffered economic loss as a result of being induced to invest money in a fraudulent scheme which violates the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968, entitled to recover preverdict and prejudgment interest to ensure adequate and complete compensation for the loss of use of that money?

2. Did the court of appeals depart from the accepted course of judicial proceedings by concluding that although the trial court exercised one of three options available to it under Rule 49(b) of the Federal Rules of Civil Procedure to reconcile an inconsistency between a general verdict and special jury interrogatories by entering judgment based on the interrogatories, which were internally consistent, the judgment entered nonetheless should be reversed?

3. Did the court of appeals depart from the accepted course of judicial proceedings by reversing a judgment which was supported by internally consistent answers to eighty-eight separate jury interrogatories, following a five week jury trial, and entered by the trial court after reviewing the matter in conjunction with post-trial motions pursuant to Rule 50 and Rule 59 of the Federal Rules of Civil Procedure, and ordering dismissal of the claims against one defendant based upon sufficiency of the evidence?

4. Where two of the parties to the underlying dispute in this matter entered into an agreement which, *inter alia*, purported to relinquish past claims but which was also supported by independent consideration, did the court of appeals depart from the accepted course of judicial proceedings by refusing to allow petitioners to recover compensatory and punitive damages totalling $2,000,000 for breach of that agreement even though the affirmative defense of release, based on that agreement, was not asserted at or prior to trial?

5. Where at trial the jury was presented with evidence of damages which specifically took into account a $600,000 payment made to petitioners prior to the commencement of these actions, did the court of appeals depart from the accepted course of judicial proceedings by nonetheless ordering that sum to be subtracted from the amount awarded to the petitioners by the jury?

6. Where the uncontradicted evidence at trial, including taped admissions, supported the trial court's charge concerning a finding of fact as a matter of law, did the court of appeals depart from the accepted course of judicial proceedings by reversing the judgment entered against that party and ordering a new trial on the basis of that portion of the jury charge?

STATEMENT OF RELATED PARTIES

There are no parent companies or subsidiaries of the two petitioning corporations in this proceeding, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation, to be listed pursuant to Rule 29.1 of the Rules of this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation respectfully request the issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, as amended, in connection with this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which is officially reported at 4 F.3d 1071, is attached as Appendix A. *See* Appendix A, *infra*, at A-1 - A-28.[1] An order amending its original opinion was issued by that court on November 29, 1993, and is not officially reported. Appendix B, App. A-29 - A-31. An order denying cross-petitions for rehearing was issued by the court of appeals on December 21, 1993. Appendix C, App. A-32 - A-34.

Following the trial in this action, the district court issued a memorandum-decision and order dated July 11, 1991 addressing the parties' post-trial cross-motions and, *inter alia*, resolving inconsistencies between the jury's general verdict in 85-CV-1337 against respondents George T. Mahshie and Tony Deeb and the jury's responses to special interrogatories and directing the entry of judgment against those respondents based on the interrogatory responses. *See* Appendix F, App. A-52 - A-78. That decision is not officially reported. Judgment was thereafter entered by the district court on August 30, 1991. Appendix D, App. A-35 - A-43. On October 7, 1991, the district court issued an oral decision from the bench denying new trial motions filed by

[1]Reference to Appendices to this petition will hereinafter be made simply as "App. ——".

respondents George T. Mahshie and Tony Deeb in Civil Action No. 85-CV-1337. Appendix E, App. A-44 - A-51.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment in this action on September 9, 1991, and denied cross-petitions for rehearing on December 21, 1993. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The key statutes involved in connection with this petition are subdivisions (b), (c), and (d) of the prohibited activities provision of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Title 18 U.S.C. §1962 (b), (c) and (d), and subdivision (c) of §1964 of the civil remedies provision of that Act, 18 U.S.C. §1964. Those statutes provide as follows:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

18 U.S.C. §1962(b)-(d).

> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. §1964(c).

STATEMENT OF THE CASE

A. Factual Background

Petitioner Abdallah Bseirani is a Christian who was born in Aleppo, Syria. After attending school in Lebanon, Bseirani moved to Detroit, Michigan to study engineering at Wayne State University. In 1968, Bseirani began working with Carrier International Corporation ("Carrier"), headquartered in Syracuse, New York. Bseirani worked in a variety of positions for Carrier in connection with its operations in the Middle East and East Africa until his resignation in 1976. After resigning from Carrier, Bseirani formed AGB International Management Corporation ("AGB International"), which is based in Syracuse, New York, and was at all relevant times engaged in the representation of American manufacturers of products related to the heating, ventilation and air conditioning industry ("HVAC") in countries throughout the Middle East, including Johns-Manville Corporation, International Boiler Works, Patterson-Kelley Co., and Marley Cooling Tower Company.

1. CSE

Bseirani was introduced to Ismail Abou-Khadra, a Moslem born in Jerusalem, in November of 1978 by respondent Mahshie,

then a practicing attorney (now disbarred) who prior to that time had represented both of them. During negotiations held in both Syracuse, New York and Riyadh, Saudi Arabia during late 1978 and early 1979, Abou-Khadra and Bseirani verbally agreed that Bseirani would be allowed to use CSE, a dormant Saudi business registered by Abou-Khadra in 1975, to increase the export of United States products through AGB International into the Middle East. Under the terms of that agreement, Bseirani was to have full control of CSE, as well as responsibility for paying all expenses of CSE, including local taxes, or "zakat."[2] Bseirani agreed to pay Abou-Khadra a monthly fee for the use of CSE, and in addition after the first full year of operation to pay him 12% of the profits of the company, 2% of which was to be paid by Abou-Khadra to Mahshie in return for his having introduced the two. Bseirani was encouraged, in entering into the agreement, by Mahshie's assurances as to Abou-Khadra's integrity.

The terms of the understanding were reduced to written agreement form in March, 1979 with the aid of Mahshie. Bseirani was asked by Mahshie to sign both the agreement and a separate letter guaranteeing all expenses and debts of CSE. Mahshie later told Bseirani, however, that Abou-Khadra had been unexpectedly called back to the Middle East and therefore would not be able to sign the agreement, resulting in Bseirani signing and delivering, at Mahshie's request and upon his assurance that this would protect Bseirani, both a unilateral letter dated March 16, 1979 outlining the terms of the agreement, and a letter dated March 14, 1979 providing the requested guarantee.

From 1979 until December, 1983, Bseirani maintained total control of CSE's operations, both personally and through his

[2]This practice of allowing a foreigner to operate and control a Saudi business, although not uncommon, was a violation of Saudi law, a fact which Bseirani was not aware of at the time he entered into the CSE agreement. The practice was referred to at trial by a Saudi law expert as "license renting."

employees. He also made periodic accounting and payments of sums due to Abou-Khadra including the agreed percentage of profits.

In December of 1983, following Bseirani's request to Abou-Khadra for a written document evidencing his ownership interest in SPPI, another venture involving the two, Abou-Khadra confiscated all of CSE's assets and forced Bseirani to leave the country. After Bseirani was forced to leave CSE, letters were sent to the American manufacturers represented by AGB International advising that Bseirani and his company would no longer be involved in CSE, and inviting them to deal directly with CSE in the future. At the time the relationship between Abou-Khadra and Bseirani was severed, the jury found, CSE held $950,000 in money and property belonging to Bseirani.

2. SPPI

Prior to 1979, Bseirani had considered establishing a facility to manufacture preinsulated pipe.[3] Initial implementation of Bseirani's idea to establish such a facility came when Abou-Khadra agreed to apply to the Ministry of Industry on behalf of Bseirani for a license temporarily in Abou-Khadra's name, the understanding being, however, that the license truly would belong to Bseirani. The license was applied for and obtained in 1981.

Bseirani then undertook negotiations with potential joint venturers for the facility, including Abou-Khadra and representatives of several other companies. At all times during the discussions it was assumed and intended that Bseirani would be an equity owner in the venture. In preparation for starting up such a facility Bseirani purchased patent and trademark rights to a preinsulated

[3]Preinsulated pipe, designed to convey liquids or gases at constant temperatures without loss or gain of heat, consists of a core pipe of steel or some other material, and an outer jacket with insulation filling the space between the two.

pipe product known as "Pittcon," as well as a related manufacturing company, U.S. Duracon, in July, 1981, transferring the assets acquired through those purchases to Pittcon Preinsulated Pipes Corporation ("Pittcon"), a New York corporation established by Bseirani.

In September, 1981, Bseirani sent his then-employee Tony Deeb to Saudi Arabia with detailed instructions for laying the initial groundwork for establishing the preinsulated pipe manufacturing facility. Deeb's instructions from Bseirani for that trip included a specific directive to discuss with Abou-Khadra the issues of capitalization and the extent of Bseirani's equity participation in the company. Deeb and Bseirani discussed these issues over the telephone and following the trip Deeb reported to Bseirani that Abou-Khadra had agreed to an initial capitalization of $1,000,000 with Abou-Khadra to own 35% of the company, and Bseirani the remaining 65%.

During discussions held between Bseirani and Abou-Khadra in Syracuse during January, 1982, it was agreed the equity split would be altered so that each would be a 49% equity owner in SPPI, with Mahshie to have the remaining 2% ownership interest. In addition, the two agreed that the initial paid-up capital for the company would be $1,000,000, with each contributing half of that amount.

Later in January, 1982, Deeb was again sent by Bseirani to Saudi Arabia to continue planning for the new facility. Among the specific tasks which Deeb was directed both verbally and in writing by Bseirani to accomplish during the trip was to obtain a $500,000 check from Bseirani's bank in Zurich, Switzerland and to deposit that check, representing Bseirani's proportionate share of initial paid-up capital for the new venture, in an SPPI account in Riyadh. Deeb also was instructed to obtain a receipt from Abou-Khadra specifically reflecting that the check represented payment of Bseirani's $500,000 capital contribution in the event

that Bseirani's equity participation in the new company was not formalized prior to depositing the money.

Coordination of the timing for formalizing Bseirani's 49% equity position in SPPI with the application that had been made for a loan from the Saudi Industrial Development Fund ("SIDF"), a governmental agency, was discussed in a series of telephone conversations leading up to February 18, 1982 between Bseirani in Syracuse, and Deeb in Riyadh; some of those conversations also involved Abou-Khadra. Bseirani was advised by telephone, and by telex from Deeb dated February 18, 1982, that Deeb, purportedly acting on Bseirani's behalf, and Abou-Khadra had concluded it would be better to defer formalizing Bseirani's equity position in SPPI until after the SIDF loan application had been made and granted, so that it would appear to the SIDF that the company was wholly Saudi owned. This was later confirmed in a telex sent by Deeb on March 10, 1982 to Antoinne Abawatt, the lawyer retained at Bseirani's request to aid in formalization of his equity in SPPI.

On February 18, 1982, Deeb was again instructed by Bseirani during a telephone conversation not to deposit the $500,000 check into an SPPI account until he had obtained a signed, written receipt from Abou-Khadra, in the form of or similar to a draft receipt which was prepared and given to Deeb by lawyer Abawatt, acknowledging that the money represented Bseirani's capital contribution to the new venture. During a subsequent telephone conversation, held on February 22, 1982, however, Deeb confessed to Bseirani that he deposited the money and that Abou-Khadra had refused to sign a receipt, as requested, specifically identifying the deposit as Bseirani's capital contribution to SPPI. Although Bseirani did not learn of this until the time of trial, the deposit actually had been made by Deeb on February 16, 1982, two days before the discussions concerning the timing of formalization of Bseirani's equity and Bseirani's explicit reiteration of his instruction to Deeb not to deposit the money without

obtaining a receipt specifying the basis upon which it was being deposited. The $500,000 deposited by Deeb into SPPI on behalf of Bseirani on February 16, 1982, was credited to SPPI's stockholder's equity account, which did not reflect that Bseirani was a part owner of SPPI.[4]

Consistent with Abou-Khadra's and Deeb's claim to Bseirani that it would look better that way, the SIDF loan application was submitted in March, 1982 giving the appearance that Abou-Khadra was the sole owner of SPPI. For the same stated reason, which was later proven to be false and obviously calculated to defraud him, Bseirani was convinced by Abou-Khadra to enter into a license agreement dated January 4, 1982 between himself, as sole owner of Pittcon, and SPPI in order to satisfy SIDF as to SPPI's ability to produce preinsulated pipe. Bseirani was asked, in light of his actual although unrecorded ownership interest in SPPI, to issue a separate written document waiving Pittcon's entitlement to any payments under that agreement.[5] That agreement was superseded by a second license agreement, dated September 29, 1982, and later by a technical assistance agreement

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[4]Abou-Khadra later claimed that the $500,000 represented monies owed to him by Bseirani as a result of the CSE agreement, and that he directed that it be deposited in his SPPI owners' equity account as a matter of his convenience.

[5]To convince SIDF that the license agreement was legitimate, and that Pittcon and Bseirani were to be mere licensors rather than part owners of the company, SPPI issued Bseirani a check for 510,000 riyals, the equivalent of the $150,000 front end fee due under those agreements, in November, 1982. The proof at trial, however, revealed that all that money was returned by Bseirani to SPPI in a manner such that it would not be easily detected were SIDF to review the books to determine the legitimacy of the license agreements. As a further indication of the sham nature of the license agreement, royalties and license fees due were not accrued on the books by SPPI.

dated February 14, 1983, and Bseirani again was asked on both occasions to sign a similar written release letter.

The SIDF loan application for SPPI was approved on August 22, 1982, although the loan proceeds were not released until mid-1983. To fund SPPI's added capital needs, Abou-Khadra and Bseirani agreed in 1983 that each would contribute equivalent amounts of capital to SPPI over and above the initial $500,000 each. Through a series of loans and the deposit in April, 1983 of a check in the amount of $87,500, Bseirani contributed a total additional amount to SPPI of $303,500. Abou-Khadra, for his part, deposited $197,000 on May 30, 1983.

In November, 1983, following a trip to the Philippines to hire employees for SPPI, a wedding and a brief business trip to Europe, Bseirani returned to Riyadh to manage SPPI. Upon his return Bseirani was warned by Deeb that Abou-Khadra was preparing to "pull the rug out from under him" and operate the factory himself.[6] Having reason to suspect that this was true, based upon Abou-Khadra's denial of several previous requests by Bseirani for formalization of his 49% interest in SPPI, as well as a very favorable November, 1983 cash flow study prepared by SPPI's internal accountant, Bseirani approached Abou-Khadra and requested formalization of the partnership. Abou-Khadra, however, refused to participate in any discussions concerning the subject. Left with no choice, Bseirani sent Abou-Khadra a letter on December 19, 1983 formally requesting proof of his equity interest in SPPI. In response, Abou-Khadra stormed into his office and directed Bseirani to leave, under threat to his physical safety and well-being. Later that day, Abou-Khadra sent Bseirani two letters which taken together stated that he had been a mere employee at CSE and SPPI, and that he was fired and directed to leave the country, which he did.

[6]Believing himself to be a part owner in the operation Bseirani neither requested nor was given salary or reimbursement for his travel expenses incurred on behalf of SPPI.

Following discussions concerning resolution of the parties' differences, Bseirani, having no written proof of his ownership interest in SPPI, and having had his successful CSE business confiscated, was left with no alternative but to accept a demand by Abou-Khadra that he enter into an agreement to accept $1,600,000, payable in the form of three checks totalling that amount to be held in escrow by Mahshie, to be given to Bseirani on April 6, 1984 ($600,000), October 6, 1984 ($500,000) and April 6, 1985 ($500,000). In return, Bseirani was to relinquish all past claims against Abou-Khadra and enter into an agreement whereby for a period of one year Bseirani would not establish a manufacturing facility in Saudi Arabia to compete with SPPI. Under that agreement, Bseirani also promised to give Abou-Khadra 10% of gross sales derived from selling preinsulated pipes in Saudi Arabia.[7] Following execution of that agreement Bseirani issued instructions to Jim Collins, his sales manager at AGB International, to add 10% to all orders placed in Saudi Arabia to account for Abou-Khadra's commissions under the agreement.

When the first check became due, Mahshie resisted releasing it, claiming that Bseirani should first provide receipts for payments of royalties under the Pittcon-SPPI license agreements, for salary, and for reimbursement for expenditures—all of which Bseirani in reality had never received. After considerable pressure by Bseirani, however, Mahshie ultimately did release the April check. In October, 1984, when the second escrowed check became due, Mahshie became elusive, and ultimately refused to release it, advising that he had been instructed by Abou-Khadra to withhold the check in light of alleged breach by Bseirani of the March 7, 1984 commercial agreement. That refusal led to the commencement by Bseirani of a proceeding in New York State

[7]A breach of contract claim by Abou-Khadra seeking $1,000,000 in liquidated damages under the March 7, 1984 commercial agreement was dismissed by the district court, on motion by the Bseirani parties for summary judgment.

Supreme Court, Onondaga County, seeking recovery of the remaining escrowed checks, and the subsequent commencement by Abou-Khadra of Civil Action No. 84-CV-1502.

B. The Proceedings In The Courts Below

Respondents Abou-Khadra, CSE and SPPI commenced Civil Action No. 84-CV-1502 in October, 1984 seeking an accounting of profits derived through the operation of CSE, the Saudi company nominally owned by Abou-Khadra, but operated by Bseirani. Petitioners counterclaimed in that action, and in October, 1985 commenced the second of these two actions, Civil Action No. 85-CV-1337, asserting various counterclaims against respondents Mahshie and Deeb, many of which mirrored their counterclaims in 84-CV-1502. Subject matter jurisdiction of the district court was invoked in both actions based upon diversity of citizenship, pursuant to 28 U.S.C. §1332. Jurisdiction also existed under 28 U.S.C. §1331, in respect of petitioners' RICO claims, and pursuant to the doctrine of pendent jurisdiction in connection with petitioners' remaining causes of action.[8]

The two actions were ordered consolidated for trial, and were tried before a jury commencing on April 8, 1991. The jury returned a general verdict, supplemented by answers to eighty-eight specific jury interrogatories, on May 6, 1991, finding that petitioners did not owe Abou-Khadra any monies under the CSE agreement and holding respondents liable in connection with several of petitioners' counterclaims in 84-CV-1502 and their principal claims against Deeb and Mahshie in 85-CV-1337. After a hearing on May 9, 1991, the jury returned a verdict and supplemental jury interrogatories, determining the amounts of punitive damages to award to the petitioners.

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[8]The commencement of the second action predated the supplemental jurisdiction provisions of 28 U.S.C. §1367.

Following the denial of motions filed by respondents pursuant to Rule 50 of the Federal Rules of Civil Procedure, the court entered judgment on August 30, 1991 awarding compensatory damages, prejudgment interest, and punitive damages, exclusive of costs and attorneys' fees, in favor of the petitioners and against respondents in varying amounts ranging up to, in the case of Abou-Khadra, $14,912,144.29. New trial motions filed by respondents Mahshie and Deeb in Civil Action No. 85-CV-1337 were denied by the district court on October 7, 1991.

On appeal to the United States Court of Appeals for the Second Circuit, the district court's judgment was vacated. The court of appeals affirmed the jury's finding of liability as against respondents Abou-Khadra, CSE and SPPI, but found that allowing petitioners to recover $1,000,000 in compensatory damages for breach of the March 10, 1984 contract resulted in a double recovery, and therefore remanded to the district court for the entry of an amended judgment against those parties subtracting that amount from the compensatory damage award.[9] The court of appeals also ordered that an additional $600,000 be deducted from the award as a credit for the payment made to petitioners in April, 1984.

With regard to respondent Deeb, the court of appeals reversed the judgment against him and ordered that petitioners' complaint against him be dismissed in its entirety for insufficiency of evidence against him. The judgment against respondent Mahshie was reversed, the court of appeals finding that the trial court should not have exercised its right under Rule 49(b) of the Federal Rules of Civil Procedure in this case to enter judgment based upon internally consistent jury interrogatory responses, in the face of an inconsistent general verdict, but instead should have directed a new trial. The matter was remanded to the district court for a new trial on the claims against respondent Mahshie.

[9]The jury's award of $1,000,000 in punitive damages on that claim was also negated as a result of that finding.

Cross-petitions for rehearing were denied by the Second Circuit on December 21, 1993, and a mandate was issued to the district court on December 30, 1993.

REASONS FOR GRANTING THE WRIT

A. Preverdict and Prejudgment Interest On Petitioners' RICO Claims

RICO does not on its face deal with the issue of entitlement by a civil RICO litigant to prejudgment interest, nor has this Court spoken to and resolved the question. The trial court therefore viewed the issue as resting within its discretion, and denied petitioners' request for prejudgment interest to compensate them for their loss of use of the monies out of which they were defrauded. This, petitioners maintain, was error which should be rectified by this Court.

When deciding whether to award prejudgment interest, courts should as a threshold matter take into account the compensatory nature of prejudgment interest awards. *Manufacturers Hanover Trust Co. v. Drysdale Securities Corp.*, 801 F.2d 13, 28 (2d Cir. 1986), *cert. denied*, 479 U.S. 1066, 107 S. Ct. 952 (1987); *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 637 F.2d 77, 87 (2d Cir. 1980). Courts making that determination also should consider the degree of personal fault or wrongdoing on the part of the RICO defendant, the availability of alternative investment opportunities to the plaintiff, and whether plaintiff unduly delayed in bringing or prosecuting the action. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176, 109 S. Ct. 987, 991-92 (1989).

Prejudgment interest is especially appropriate when liability is premised upon breach of a fiduciary duty, as well as in instances when lost investment opportunities are involved, the theory being that by its actions the plaintiff has manifested an intention to use the lost money for financial gain. *Rolf*, 637 F.2d at 87; *Strobl v.*

New York Mercantile Exchange, 590 F. Supp. 875, 882 (S.D.N.Y. 1984). As one commentator has noted, applying this governing principle to RICO damage awards:

> Courts that have considered the availability of prejudgment interest where a statute provides for doubling or trebling the damages have first determined whether the damages were intended as remedial or penal. Because Congress explicitly characterized RICO treble damages as remedial, courts should award prejudgment interest. Not only is the availability of interest consistent with the overall remedial purposes of RICO, it is also consistent with the compensatory goal of the treble damage provision because prejudgment interest makes the plaintiff whole.

Judith A. Morse, Note, *Treble Damages Under RICO: Characterization and Computation*, 61 Notre Dame L. Rev. 526, 545 (1986) (citations omitted).

The compensatory objective of prejudgment interest awards, viewed in the context of the nature of petitioners' claims, militates strongly in favor of such an award in this instance. The trial jury found that petitioner Bseirani was defrauded out of large sums of money that he had invested in the business venture in issue, SPPI, a venture which, the proof at trial revealed, was predicted to be exceedingly profitable. Bseirani was deprived of the use of the funds which he had invested in SPPI from December, 1983, when his monies were misappropriated and he was forced to leave Saudi Arabia, until judgment was entered in August, 1991. The lost investment opportunities to petitioner Bseirani during this period can only be compensated adequately and fully through a prejudgment interest award.

B. Entry Of Judgment Against Respondents Mahshie And Deeb Based Upon The Jury's Special Interrogatory Responses

In addressing the obvious inconsistency between the jury's general verdict against both Mahshie and Deeb and the jury's responses to interrogatories, the trial court exercised an option available to it under Rule 49(b) of the Federal Rules of Civil Procedure by entering judgment based upon the interrogatory responses notwithstanding the inconsistent general verdict.[10] The court of appeals, while acknowledging that this one course of action was available to the trial court under Rule 49(b), nonetheless set aside that determination as inappropriate, finding that there was clear jury confusion and concluding that it would be "sheer speculation" to conclude that by awarding no compensatory damages against Mahshie and Deeb the jury simply intended to avoid the possibility of a double recovery. With due respect to that court, this simply is not the case.

It is undeniable that the jury found liability on the part of both Mahshie and Deeb for acts which, it also found, proximately caused damage to the petitioners. In Mahshie's case, for example,

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[10]In answering the special interrogatories posed to it by the court, the jury found liability on the part of respondents Mahshie and Deeb on several causes of action, and in addition found damage proximately suffered by petitioners as a result of those findings of liability. In their general verdict, however, the jury awarded petitioners "punitive damages only" as against defendants Mahshie and Deeb in Civil Action No. 85-CV-1337, the only action in which claims were asserted against those parties. The trial court's response to this patent inconsistency, which was acknowledged by all parties at the time, was to direct the jury to return for further deliberation and clarification of its verdict. This, however, yielded no elucidation concerning the jury's reasoning, resulting in the trial court having to decide whether to enter judgment based upon the special interrogatories, rejecting the general verdict, or instead order a new trial.

the jury found that defendant Mahshie alone was liable for conversion, resulting in $1,000,000 in damages to the Bseirani parties, and that Mahshie alone committed malpractice, causing damage in the amount of $4,130,500. *See* Appendix G, App. A-90 - A-91. Both of these claims were asserted only against Mahshie, thereby making it entirely appropriate for the district court to hold him accountable, by its judgment, for damages on those claims. The jury also found Mahshie, jointly together with Abou-Khadra and Deeb, liable for fraud, conspiracy to defraud and two separate counts of conspiracy to violate RICO, and that by those actions they caused injury to the Bseirani parties. *See* Appendix G, App. A-81 - A-84.

The jury's reasoning for totaling compensatory damages and concluding that none were awardable against Deeb and Mahshie is obvious from analysis of the interrogatory responses. In each instance, when awarding damages on claims for which respondent Mahshie was held liable, the jury found that those damages were included in amounts previously awarded as against Ismail Abou-Khadra, CSE and/or SPPI. Thus, for example, the sum awarded against respondent Mahshie for conversion ($1,000,000) is identical to and was included within the sum awarded against Abou-Khadra only in response to Interrogatory No. 63. *See* Appendix G, App. A-90 - A-91. Similarly, the amount awarded against Mahshie, as well as Deeb and Abou-Khadra, both for fraud under Interrogatory No. 11 and for conspiracy to defraud under Interrogatory No. 15 ($1,930,500), was also the same as that awarded against Abou-Khadra and SPPI only in Interrogatory No. 8. *Id.*, App. A-80 - A-82. In addition, the damages against Mahshie on the two RICO conspiracy claims, in response to Interrogatories Nos. 26 and 35, again were identical in amount to those already awarded against Abou-Khadra and SPPI only in response to Interrogatory No. 8. *Id.*, App. A-83 - A-84.

This same situation applies with respect to the sum awarded against Mahshie only for malpractice under Interrogatory No. 85 ($4,130,500). That amount was found by the jury to have been included in damages awarded under prior causes of action, and

clearly consisted of the aggregate of the following amounts none of which were awarded against Mahshie: $1,980 against Abou-Khadra and SPPI; $1,000,000 against Abou-Khadra; $250,000 against Abou-Khadra, SPPI, and CSE; and $950,000 against Abou-Khadra and CSE. Appendix G, App. A-80, A-87.

In sum, the basis for the jury's determination could not be clearer. Indeed, by other portions of its responses the jury plainly indicated its ability to determine when compensatory damages were not *caused* by wrongdoing even in the face of a finding of liability.[11] The district court thus viewed the jury interrogatory responses with total confidence as to the jury's intention, and properly exercised the one of two remaining options available to it under Rule 49(b), after asking the jury for clarification, by entering judgment against Mahshie in accordance with the jury's interrogatories, thereby avoiding the burden and expense of a new trial. Petitioners respectfully maintain that this exercise of the district court's discretion should not have been disturbed on appeal. *Veranda Beach Club Limited Partnership v. Western Surety Co.*, 936 F.2d 1364, 1382 (1st Cir. 1991)("The trier's discretion as to which procedural route [available under Rule 49(b)] should be traversed is not unbridled, but it is deserving of considerable respect on appeal." [citations omitted]).

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[11]For example, although the jury found by its response to Interrogatory No. 37 that Abou-Khadra had committed tortious interference with contract, in its response to Interrogatory No. 38 it found that this act did not cause any damages, and determined therefore to award punitive damages only on that claim. Appendix G, App. A-85. The district court and the parties all agreed that an award of punitive damages on this claim could not be sustained in light of the jury's failure to award any compensatory damages.

C. Reversal Of The Judgment And Dismissal Of All Claims Against Tony Deeb

In less than three full pages of text the court of appeals, limited by the circumstances to a cold review of the voluminous record in this case and lacking the benefit enjoyed by the district court of witnessing the trial firsthand, not only erased a jury's detailed findings of liability on the part of Tony Deeb, but went further by ordering the drastic remedy of dismissal of all claims against him, finding a lack of sufficient evidence to link him to the fraudulent scheme mounted against the petitioners. This result comes in stark contrast to both the jury's responses to an extensive set of interrogatories and a determination by the trial court, in response to post-trial motions, that there was ample evidence to support the jury's finding of Deeb's participation in the scheme against Bseirani. For this reason, and because the court of appeals' decision reflects a misunderstanding of Deeb's pivotal role in the fraud scheme at issue, petitioners respectfully maintain that that portion of the court's decision represents a significant departure from the accepted course of judicial proceedings, and thus should be reviewed by this Court.

The fraudulent scheme against the Bseirani parties was materially advanced, indeed cemented, by Deeb's unauthorized deposit of $500,000 of Bseirani's money into an SPPI bank account in February, 1982. This was done in the face of Bseirani's express instruction not to do so unless either his equity interest in SPPI had been confirmed in writing, or at a minimum a receipt had been obtained detailing the purpose for the payment. It was this unauthorized deposit into an SPPI account over which Bseirani had no control that allowed Abou-Khadra to have his way with Bseirani, including to demand increases in the percentage which he was to receive with regard to CSE profits, and in the end to confiscate Bseirani's interests in SPPI and CSE.

Crucial to the court of appeals' determination with respect to Deeb was an apparent belief that Bseirani was not harmed by Deeb's deposit without a receipt, since Bseirani had available to him his cancelled check and a bank receipt reflecting the deposit into an SPPI account, and in any event the SPPI internal financial records showed that the deposit was made and the money allocated to "owner's equity."[12] This conclusion is astonishing in light of the circumstances of this case.

There was never any dispute as to whether or not the $500,000 payment passed between Bseirani and SPPI. The disagreement centered around the basis for the payment. At trial, Abou-Khadra testified that the $500,000 was a payment made to him by Bseirani for monies owed to compensate him for commissions owing under the CSE agreement. According to him, Abou-Khadra merely asked that the payment be made to SPPI, a company of which he claims exclusive ownership, rather than to him personally as a matter of his convenience. Deeb, who knew full well that discussions between Abou-Khadra and Bseirani had resulted in agreement whereby each was to make a capital investment of $500,000 in SPPI, nonetheless testified that he did not know what the $500,000 check was for and maintained that it was a mere coincidence that it was in the exact amount reflected in the draft receipt prepared by attorney Antoinne Abawatt. It therefore was of critical importance that Deeb obtain a receipt which clearly reflected more than just the mere payment of $500,000 from Bseirani to Abou-Khadra, one which in fact would show Bseirani's 49% equity interest in SPPI. Thus, the availability of a form bank receipt merely showing that the deposit was made, assuming *arguendo* that Bseirani had received it, and a cancelled

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[12]The receipt to which that court apparently refers was not given to Bseirani, who in fact was not aware of its existence until the trial. In any event, that receipt did not make reference to Bseirani's 49% ownership interest in SPPI, nor did it identify the purpose for the payment.

check neither of which showed the reason for the $500,000 payment was of no value to Bseirani.

The fact that the money was attributed to SPPI owner equity for internal accounting purposes, another factor cited by the court of appeals as supportive of Deeb's innocence, similarly was of no comfort to Bseirani. Abou-Khadra was the sole owner of record of SPPI in February, 1982, and there was nothing in the internal ledger entry to reflect that the money came from, and should be attributable to, Bseirani. It was for these reasons that Deeb was instructed specifically to obtain a receipt showing that the money represented an advance of capital contribution by Bseirani for SPPI, and that if Bseirani's equity interest in that company was not formalized then the money would be returned to him.

Deeb's deep involvement in the fraud scheme is also demonstrated by the timing of the deposit vis-a-vis discussions between Bseirani and Abou-Khadra concerning equity formalization, as well as from the fact that the $500,000 was not returned by Deeb to Bseirani despite his request. The proof at trial showed that while Bseirani was not told of the deposit until six days later, the check was actually deposited into an SPPI account two days prior to the lengthy February 18, 1982 discussions involving Deeb, Bseirani and Abou-Khadra during which those parties debated over the timing of equity formalization. Later, when Deeb was asked by Bseirani to withdraw the check, he refused to do so, claiming that he had no power of signature over the account into which it was deposited, a statement which was proven to be false.[13]

There are many other indicators in the record of Deeb's active participation in the scheme against the petitioners, including his withholding from Bseirani two memoranda of meetings with

[13]Notably, although Abou-Khadra and Deeb were authorized signatories with respect to that SPPI account, Bseirani was not and thus could not himself withdraw the deposited monies.

Saudi Investment Development Fund ("SIDF") representatives, memoranda which reflect SIDF advice to the effect that formalization of Bseirani's equity interest in SPPI prior to application for an SIDF loan would have been beneficial. Relying on advice to the contrary, Bseirani yielded and opted for postponement of formalization of his equity participation. Similarly, the jury was presented with a handwritten memorandum sent by Deeb to Mahshie, who the jury found also to have been actively involved in the scheme, reporting to Mahshie on Deeb's actions taken at the behest of his employer, Bseirani, concerning deposit of the $500,000 check in an SPPI account. The testimony at trial also showed that Deeb was handsomely rewarded by Abou-Khadra for his role in the scheme, having received several sizable bonuses from Abou-Khadra at odd times, including one in a year in which SPPI lost money.[14]

In sum, the evidence presented to the jury over a period of several weeks during the trial of this action led the trial court to conclude "that each of the jury's findings of liability and awards of compensatory and punitive damages were reasonable in light of all the evidence presented during the trial." Appendix F, App. A-69. The court of appeals, based upon an apparent misunderstanding of the instructions given by Bseirani to Deeb surrounding the $500,000 deposit, and the horrific results to Bseirani once his $500,000 was relinquished without so much as a simple piece of paper identifying the purpose for which the payment was made, reached a conclusion concerning Deeb's involvement which is diametrically opposite to that reached by the jury and the trial court. Petitioners therefore request that this Court review the

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[14]The proof at trial also revealed that during pretrial discovery Deeb intentionally directed the withholding of a letter which he wrote to Abou-Khadra shortly after the December, 1983 confrontation between Abou-Khadra and Bseirani, a fact from which the jury reasonably could have concluded that he was demanding money from Abou-Khadra for his part in the scheme, and for his silence.

portion of the decision of the court below related to Deeb, reversing the jury's finding of liability against him and ordering dismissal of all claims against him, in order to rectify a serious miscarriage of justice.

D. Dismissal of Petitioners' Breach of Contract Claim And Subtraction of $2,000,000 In Compensatory and Punitive Damages From The Jury's Award

In March, 1984, after respondent Abou-Khadra's confiscation of CSE and SPPI and the assets of those two companies, and his directive to petitioner Bseirani to leave Saudi Arabia at once, the parties entered into two contemporaneous agreements. The first, which was drafted by Mahshie, a participant in the fraud scheme, on a general release form, provided for payment by Abou-Khadra to Bseirani of $1,600,000 in three installments. The second agreement governed the prospective competitive relationship between the two parties and their respective companies in Saudi Arabia. During pretrial discovery, Abou-Khadra, who did not testify at trial with regard to this facet of the case, took the position that the $1,600,000 promised to Bseirani was not only in consideration for relinquishment of past claims, but in addition represented payments which were to have been received by petitioners under the Technical Assistance Agreement between Pittcon and SPPI, as well as payments in consideration for prospective restrictions on Bseirani competing with him in the future.

After waiving the legal effectiveness of the release portion of the first of those two agreements entered into on March 7, 1984 on three separate occasions prior to and at the trial of this action, respondents argued for the first time on appeal that since that contract was in the form of a release, allowing petitioners to enforce the agreement and also recover on underlying claims resulted in a double recovery and should not have been permitted by the district court. Since it is abundantly clear that petitioners did not, as the court of appeals assumed, receive a double or

overlapping recovery, and since respondents' gross inaction in not raising the issue prior to trial severely prejudiced petitioners and affected the way in which they proved their case, the court of appeals' assumption in this regard and corresponding subtraction of $1,000,000 in compensatory damages and another $1,000,000 in punitive damages from the judgment in petitioners' favor constituted a departure from the accepted course of judicial proceedings which should be reviewed by this Court.

At all stages in this proceeding respondents were well aware of the existence of the March 7, 1984 agreement. Indeed, the first of these two actions was commenced in October, 1984 immediately after, and as a direct result of, the refusal of George Mahshie, who was acting under that agreement as escrow agent and holding three checks totalling the $1,600,000 total consideration, to provide petitioner Bseirani with the second of the three checks on the due date, leading Bseirani to commence an action in state court prior to Abou-Khadra filing this action. Despite this knowledge, respondents sat idly by and on three separate and distinct occasions waived their argument that the March 7, 1984 agreement constituted a release and should bar Bseirani's maintenance of the underlying claims in this action.[15] The first such waiver occurred when, in responding to petitioners' counterclaims in this action, respondents failed to raise the affirmative defense of release. *See* Fed. R. Civ. P. 8(c). This constituted a waiver of the defense and should have resulted in exclusion of that defense from this case. *E.g.*, *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 n.2 (2d Cir. 1988); *Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir. 1984); *Dobbs v. Vornado, Inc.*, 576 F. Supp. 1072, 1080-81 (E.D.N.Y. 1983). Since respondents failed to plead release as a specific, articulated affirmative defense, they waived their right

[15]The Bseirani parties were prepared to argue and prove duress in defense of the March 7, 1984 release, but were not required to do so since the release was not raised by appellants as an affirmative defense. The jury thus was not presented with, nor did it pass upon, the issue of the validity of the release.

to assert the defense at later stages in the litigation. *Menendez v. Perishable Distributors, Inc.*, 763 F.2d 1374, 1378-79 (11th Cir. 1985); *Seaboard Surety Co. v. Harbison*, 304 F.2d 247, 251 (7th Cir. 1962).

A second and distinct waiver of the release, based upon the March 7, 1984 agreement, occurred when respondents did not object to the trial court's jury charge to which they assigned error in the court of appeals. Their failure to object to the charge before the jury retired should have precluded the respondents from voicing an objection to that charge in the court of appeals. *E.g., Earl v. Bouchard Transportation Co., Inc.*, 917 F.2d 1320, 1325-26 (2d Cir. 1990); *Baskin v. Hawley*, 807 F.2d 1120, 1132 (2d Cir. 1986); *Air Et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 493 (2d Cir. 1985); *Haskell v. Kaman Corp.*, 743 F.2d 113, 123 (2d Cir. 1984); *Roberts v. City of Troy*, 773 F.2d 720, 723 (6th Cir. 1985). Respondents' failure to object to the charge before the jury retired also estopped them from requesting a new trial on the basis of their objection to the charge. *E.g., Abraham v. Pekarski*, 728 F.2d 167, 172 (3d Cir. 1984), *cert. denied*, 467 U.S. 1242, 1045 S. Ct. 3513 (1984); *United States Football League v. National Football League*, 644 F. Supp. 1040, 1054 (S.D.N.Y. 1986), *aff'd*, 842 F.2d 1335 (2d Cir. 1988), *cert. denied*, 493 U.S. 1071, 110 S. Ct. 1116 (1990). This conclusion is required by Rule 51 of the Federal Rules of Civil Procedure which provides in part that:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

Fed. R. Civ. P. 51.

Yet a third waiver occurred on the part of respondents when they failed to once again raise the issue prior to the entry of

judgment. Although respondents Abou-Khadra, CSE and SPPI filed post-trial motions pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, this claim was not raised in the context of that motion. It is well-established that post-judgment motions cannot be used to raise arguments or objections to jury instructions that could, and should, have been brought to the trial court's attention prior to the entry of judgment. *E.g., Firestone Tire and Rubber Co. v. Pearson*, 769 F.2d 1471, 1478 (10th Cir. 1985); *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710, 721 (D.C. Cir. 1973). Thus, since the argument upon which the court of appeals focused was never raised before the trial court in a timely fashion it should not have been considered by that court.[16] *Enercomp, Inc. v. McCorhill Publishing, Inc.*, 873 F.2d 536, 549 (2d Cir. 1989); *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*, 830 F.2d 1217, 1220 (2d Cir. 1987).

The court of appeals sidestepped the effect of this triple waiver by citing its responsibility to avoid a double recovery, which it characterized as a mistake of law. It is not at all clear, however, that there was such a double recovery on the part of the petitioners. Indeed, an analysis of the jury's verdict reveals, without question, that the damages awarded to petitioners as relates to SPPI were carefully calculated by the jury to avoid the type of double recovery against which the court of appeals sought to guard, and that there in fact was no double recovery by the petitioners. The jury clearly took the valuation testimony of Louis A. Paone, the *only* evidence at trial concerning the value of Bseirani's 49% equity interest in SPPI, as a starting point. The jury then took into consideration the fact that Bseirani was paid $600,000, a fact of which the jury was well aware from both testimony and because the $600,000 check was admitted in evidence at trial. After deducting that amount, the jury awarded

[16]Respondent Abou-Khadra further waived his right to argue release by failing to raise the objection to the district court at any point in time, even after the entry of judgment.

$1,000,000 in connection with Bseirani's breach of contract claim, and attributed the balance of the fair value of Bseirani's 49% interest to the fraud and RICO claims related to SPPI. As can be seen, the amount awarded on those causes of action ($1,930,500), when added to the $1,000,000 and $600,000 sums, totals $3,530,500, and corresponds almost exactly to the average of the high and low value figures testified to by Paone ($3,573,826.50).[17]

The assumption of the court of appeals that the $1,000,000 recovered under the breach of contract claim, and the corresponding $1,000,000 in punitive damages recovered under that claim, resulted in a double recovery and should lead to subtraction of those amounts from the underlying judgment resulted in a gross injustice to the petitioners. Not only did the court of appeals, by doing that, act on the assumption that the jury had rendered overlapping or duplicate awards, something which the petitioners were careful to avoid and which, analysis of the verdict shows, did not occur, but it in essence rewarded the respondents for their inaction. Had respondents raised the issue in a timely fashion, petitioners could have explored at trial the independent consideration supporting the $1,600,000 in payments under the March 7, 1984 commercial agreement. By having the issue raised for the very first time in the court of appeals, petitioners were denied this opportunity, and were deprived of the recovery of the $1,000,000 unpaid contract balance even though it was promised wholly, or at least in part, in consideration for Bseirani's promise not to compete, a promise by which he abided.

The portion of the court of appeals' decision which ordered subtraction from the judgment amount of $2,000,000 on this basis, petitioners respectfully contend, therefore constituted a significant departure in the accepted course of judicial proceedings and should be reviewed by this Court.

[17]According to Paone, the fair value of that interest ranged somewhere between $3,380,370 and $3,767,283.

E. Subtraction Of $600,000 From The Jury's Award Against Abou-Khadra

In addition to directing subtraction of $1,000,000 in compensatory damages and $1,000,000 in punitive damages from the judgment entered against Abou-Khadra and the two Saudi companies registered in his name, CSE and SPPI, the court of appeals ordered a further reduction of the judgment entered against them by finding that Abou-Khadra should be given credit for a $600,000 payment made to Bseirani in April, 1984. The apparent basis for the court's reduction of the award by this $600,000 amount was in furtherance of its effort to avoid a double recovery by the petitioners based upon the March 7, 1984 agreement and the underlying RICO, fraud, and pendent state law claims. Because the jury's verdict clearly reflects that there was no double recovery, this too, petitioners maintain, constituted error.

As the foregoing reflects, there was no double recovery afforded to the petitioners. *See* pp. 25-26, *ante*. In presenting their case to the jury and requesting an award which would compensate them fairly for their losses, petitioners were scrupulous to credit respondents for all payments, including the $600,000 April, 1984 installment. In the end, in light of the court of appeals' decision, this worked to their detriment since after the jury deducted that sum from the amount awarded, the court of appeals subtracted it once again.[18]

In sum, it is clear that the district court did not by its judgment permit the petitioners to recover twice for the same damages but in fact did take into account the $600,000 payment previously made by Abou-Khadra to Bseirani. It was therefore error, the petitioners respectfully submit, for the court of appeals to order

[18]Because the jury deducted this amount from its RICO award, which was trebled, petitioners actually were deprived of $1,800,000 when the jury took the $600,000 payment into account.

reduction of the judgment entered against the Abou-Khadra parties in that amount.

F. Reversal Based Upon The Court's Charge Concerning Respondent Mahshie's Two Percent Ownership Interest In SPPI

The court of appeals reversed the trial court's judgment against respondent Mahshie, rejecting responses to a detailed set of interrogatories plainly demonstrating that the jury was totally convinced of his involvement in the fraudulent scheme against the petitioners, and ordered a new trial on all claims against him. Pivotal to that court's decision, which eradicated in large part the results of a lengthy trial, was a finding that the trial court should not have charged the jury that Mahshie was a 2% owner of SPPI and CSE. That conclusion overlooked the overwhelming evidence at trial supporting that fact finding, and represented a significant departure from the accepted course of judicial proceedings.

It is appropriate for a district court to determine a factual issue, and thus remove it from the jury's province, when only one conclusion may reasonably be reached by the jury based upon the evidence at trial. *West v. State Farm Fire and Casualty Co.*, 868 F.2d 348, 350 (9th Cir. 1989); *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 128 (1st Cir. 1987); Fed. R. Civ. P. 50(a). In this case, the record was replete with indications that from the outset of the relationship between Bseirani and Abou-Khadra, respondent Mahshie was treated as a 2% owner in CSE, a fact which Mahshie acknowledged, testifying that his 2% interest was intended by the parties to compensate him for his legal services. The record also showed that from the outset of the SPPI discussions, Mahshie was included by Abou-Khadra and Bseirani as a 2% owner for similar reasons. During his testimony Abou-Khadra never denied this fact. Moreover, while the court of appeals determined that "there was also evidence that Bseirani

had denied that Mahshie was an owner" (Appendix A, App. A-23), this simply is not the case. Indeed, at all stages in the proceedings, including in connection with the expert witness testimony submitted at trial to establish his damages, Bseirani treated himself and Abou-Khadra as 49% owners of SPPI, with the remaining 2% belonging to Mahshie.

Noteworthy is the fact that at no time during the trial did defendant Mahshie unequivocally testify that he was not at any time an owner of SPPI. Instead, his testimony was merely that he did not *discuss* a 2% ownership in SPPI with the parties. Moreover, the record contains a tape recorded conversation in which Mahshie not only admitted, but in fact boasted of, his ownership interest in SPPI. While at trial Mahshie was given every opportunity squarely to deny his 2% ownership, the best that he could do was to say that he was joking when, during his tape recorded conversation, he volunteered the fact of his 2% ownership.

As the foregoing reflects, the trial court properly charged the jury that the proof established Mahshie's ownership interest in CSE and SPPI. *Cf. Fane v. Zimmer, Inc.*, 927 F.2d 124, 128 (2d Cir. 1991); *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) ("A mere scintilla of evidence is insufficient to present a question for the jury. . . . There must be a conflict in substantial evidence to create a jury question.") That charge therefore should not have been used by the court below as a basis for reversal of the judgment against respondent Mahshie.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in order to allow this Court to consider the issues raised herein.

Respectfully submitted,

HANCOCK & ESTABROOK
David E. Peebles, of Counsel
Attorneys for the Petitioners
Office & P.O. Address
MONY Tower I - P.O. Box 4976
Syracuse, New York 13221-4976
Tel: (315) 471-3151

Dated: March 18, 1994
Syracuse, New York

APPENDIX A—Opinion dated September 9, 1993 of The United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
For The Second Circuit

Nos. 1023, 1024, 1025, 1131—August Term, 1991
(Argued: February 28, 1992 Decided:
September 9, 1993)
Docket Nos. 91-7961, 91-9153, 91-9193, 91-9195

ISMAIL ABOU-KHADRA; CONTRACTORS SERVICES ESTABLISHMENT; and SAUDI PREINSULATED PIPES INDUSTRIES,

Plaintiffs-Appellants-Cross-Appellees,

v.

George T. Mahshie,

Defendant,

ABDALLAH G. BSEIRANI; AGB INTERNATIONAL MANAGEMENT CORPORATION; and PITTCON PREINSULATED PIPES CORPORATION,

Defendants-Appellees-Cross-Appellants.

ABDALLAH G. BSEIRANI; AGB INTERNATIONAL MANAGEMENT CORPORATION; and PITTCON PREINSULATED PIPES CORPORATION,

Plaintiffs-Appellees-Cross-Appellants,

v.

Wasfieh Abou-Khadra,

Defendant,

GEORGE T. MAHSHIE and TONY DEEB,

Defendants-Appellants-Cross-Appellees.

Before:

LUMBARD, NEWMAN and WINTER,
Circuit Judges.

Appeal from a judgment entered in the United States District Court for the Northern District of New York (Howard G. Munson, *Judge*), following a jury trial, awarding damages to appellees on claims for breach of contract, fraud, conspiracy to defraud, civil RICO, unjust enrichment, conversion, *quantum meruit*, breach of duty of honesty and fair dealing, breach of fiduciary duty and legal malpractice.

Affirmed in part, reversed in part, and remanded.

ARTHUR W. ROVINE, Baker & McKenzie, New York, New York, *for Ismail Abou-Khadra, Contractors Services Establishment, Saudi Preinsulated Pipes Industries and Tony Deeb.*

JAMES D. LANTIER, Smith, Sovick, Kendrick, Schwarzer & Sugnet, P.C., Syracuse, New York, *for George Mahshie.*

DAVID E. PEEBLES, Syracuse, New York (Martha L. Berry, Hancock & Estabrook, Syracuse, New York, of counsel), *for Abdallah G. Bseirani, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation.*

WINTER, *Circuit Judge:*

Ismail Abou-Khadra, Contractors Services Establishment ("CSE"), Saudi Preinsulated Pipes Industries ("SPPI"), Tony Deeb and George Mahshie appeal from judgments of several million dollars entered against them.[1] Their appeals raise a tangle of issues complicated by the fact that they chose not to raise many of them in the district court. We affirm the findings of liability as to Abou-Khadra, CSE and SPPI, but we vacate the judgment entered against them and remand to the district court to modify that judgment. Because there was insufficient evidence of Deeb's connection to any wrongdoing, we reverse the judgment against him.

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[1]The specific judgments, including interest, trebling where applicable, and punitive damages, were as follows:

Abou-Khadra	$14,912,144.29
CSE	$5,318,322.43
SPPI	$5,318,322.43
Deeb	$7,386,539.94
Mahshie	$13,396,478.72

Liability on the compensatory portion of these awards was joint and several as among all of the appellants.

Finally, because a number of errors prejudicial to Mahshie were made during the trial, we reverse the judgment against him and remand to the district court for proceedings consistent with this opinion.

BACKGROUND

A. *The Parties*

Appellant Ismail Abou-Khadra is a citizen and resident of Saudi Arabia. In 1975, Abou-Khadra established appellant CSE, a Saudi Arabian entity engaged in the sale of building supplies.

Appellee Abdallah G. Bseirani was born in Syria and educated in Lebanon and the United States. He is now an American citizen. After working for a number of years for Carrier International Corporation's Middle Eastern and East African operations, Bseirani resigned in 1976 to begin his own company. He formed appellee AGB International Management Corporation ("AGBI"), a New York corporation that represents the interests of American manufacturers of heating, ventilation and air-conditioning equipment in the Middle East.

Appellant George T. Mahshie is an attorney practicing in Syracuse, New York, who, prior to the events giving rise to this action, had been associated with both Abou-Khadra and Bseirani.

Appellant SPPI is a Saudi Arabian sole proprietorship owned by Abou-Khadra, which is licensed by the Saudi Ministry of Industry to produce preinsulated pipe—pipe designed to transport gases and liquids at a constant temperature—at a manufacturing facility located in Saudi Arabia.

Appellee Pittcon Preinsulated Pipes Corporation ("Pittcon") is a New York corporation formed by Bseirani, who is the president and sole shareholder. Pittcon currently holds a process patent for the manufacture of preinsulated pipe and trademark for its name as applied to that pipe. Bseirani had purchased this trademark and patent in 1981 from Pittcon Systems Company.

Appellant Tony Deeb is a Lebanese citizen who was hired by Bseirani in 1981 to assist in Bseirani's and Abou-Khadra's Saudi Arabian operations.

B. *The CSE Arrangement*

In the late 1970s, Bseirani became interested in selling heating, ventilation and air-conditioning equipment in Saudi Arabia. However, Saudi law prohibits a non-Saudi entity from importing products for sale in Saudi Arabia unless sponsored by a Saudi entity. In November 1978, Mahshie told Bseirani that Abou-Khadra might be interested in assisting Bseirani in setting up an import operation in Saudi Arabia.

Bseirani and Abou-Khadra engaged in a series of negotiations in Syracuse and Riyadh, Saudi Arabia. It is undisputed that, as a result of these negotiations, Abou-Khadra agreed to allow Bseirani to import heating, ventilation and air-conditioning equipment to sell in Saudi Arabia under the auspices of the then-dormant CSE and that Bseirani agreed to pay CSE's expenses and to guarantee CSE's debt or other liability. It is also undisputed that Bseirani agreed to pay Abou-Khadra a monthly fee. However, Abou-Khadra claimed that Bseirani agreed to pay him twelve percent of the gross sales of CSE, while Bseirani testified that he had agreed to pay Abou-Khadra twelve percent only of gross profits.

According to Bseirani, the terms of this agreement were reduced to writing in March 1979, with the assistance of Mahshie. Bseirani testified that on March 16, 1979, he signed a letter detailing the terms, and gave the letter to Mahshie, who purportedly assured Bseirani that Abou-Khadra received a copy. Mahshie allegedly told Bseirani that although the letter had not been signed by Abou-Khadra, it was binding upon him. Abou-Khadra, however, testified that he neither saw this letter nor consented to the provision for payment of twelve percent of CSE's gross profits rather than twelve percent of gross sales.

Bseirani thereafter imported and sold heating, ventilation and air-conditioning equipment through CSE and, pursuant to the agreement, made periodic accountings and payments of amounts that he believed were owed to Abou-Khadra. In December 1983, Abou-Khadra allegedly confiscated the company from Bseirani. *See* § D, *infra*.

C. *The SPPI Arrangement*

During 1979, Bseirani discussed with Abou-Khadra the possibility of cooperation in opening a facility in Saudi Arabia to manufacture preinsulated pipe. Thereafter, Abou-Khadra founded SPPI as a sole proprietorship under Saudi law, and in 1980 applied on behalf of SPPI to the Saudi Ministry of Industry for a license to build a preinsulated pipe facility. In May 1981 the Ministry of Industry approved the application. At about the same time, and in preparation for the Saudi preinsulated-pipe operation, Bseirani established Pittcon, to which he transferred the recently purchased patent and trademark rights to the preinsulated pipe known as "Pittcon."

Bseirani testified that in September 1981, he sent Deeb to Saudi Arabia to continue negotiations with Abou-Khadra,

specifically with regard to the capitalization of SPPI and the respective contributions of Bseirani and Abou-Khadra towards the needed capital. A series of meetings in Syracuse between Bseirani and Abou-Khadra followed. According to Bseirani, it was agreed that SPPI's initial capitalization would be $1 million and that Bseirani and Abou-Khadra would each hold a forty-nine percent equity interest in the company, with Mahshie holding the remaining two percent. This agreement was never reduced to writing, and Mahshie denied any such ownership interest.

In January 1982, Deeb again journeyed to Saudi Arabia. In connection with this trip, Bseirani instructed Deeb to obtain a $500,000 check from Bseirani's bank in Zurich and to give the check to Abou-Khadra. Bseirani testified that the $500,000 was to be his cash contribution to the capitalization of SPPI. Bseirani also testified that he asked Deeb to obtain a receipt from Abou-Khadra evidencing delivery of the check as Bseirani's capital contribution to SPPI. Deeb, however, never obtained such a receipt and at trial denied that Bseirani had asked for one. The $500,000 check was deposited into SPPI's account on February 16, 1982. The financial records of SPPI describe this deposit as "owner's equity." In March 1982, Abou-Khadra deposited approximately $500,000 of his funds into SPPI's account, also recorded as "owner's equity."

Bseirani became concerned that his equity interest in SPPI, which under Saudi law was a sole proprietorship owned by Abou-Khadra, had never been formalized. Thus, during Deeb's second trip to Saudi Arabia, Deeb met with a Saudi attorney, Antoine Abawatt, on Bseirani's behalf regarding the means by which Bseirani, a non-Saudi, might protect his interest in SPPI. Abawatt then prepared a report for Bseirani, outlining steps Bseirani might take to formal-

ize his interest in SPPI. Deeb forwarded this report to Bseirani.

In March 1982, Deeb, who had discussed the matter with both Abawatt and Abou-Khadra, advised Bseirani that it was preferable to postpone formalization of Bseirani's interest. Deeb sent Bseirani the documents upon which this recommendation was based. Accordingly, Bseirani, who testified that he had discussed the matter with Abou-Khadra as well, agreed to put off formalizing his equity interest in SPPI.

In an attempt to facilitate approval of a loan from the Saudi Industrial Development Fund, SPPI and Pittcon entered into a license agreement on January 4, 1982. This agreement granted SPPI a license to use the Pittcon trademark and the patented process for producing Pittcon preinsulated pipe in Saudi Arabia. The license demonstrated to the Saudi Industrial Development Fund that SPPI was technically capable of manufacturing preinsulated pipe. A second license agreement, dated September 29, 1982, superseded the January agreement and was in turn superseded by a technical assistance agreement dated February 14, 1983. Both new agreements were entered into at the request of the Saudi Industrial Development Fund.

The loan application was finally approved in August of 1982. The funds, however, were not released until the middle of 1983. Because of a lack of funds prior to that time, Bseirani and Abou-Khadra both provided additional loans and capital contributions to SPPI. Bseirani also signed an employment agreement with SPPI which, he testified at trial, was necessary to his obtaining a work visa from the Saudi government. This agreement named Bseirani general manager of SPPI.

Construction of the manufacturing facility was completed in early 1983, and the first shipment of preinsulated pipe went out in November.

D. *The Dispute Between Abou-Khadra and Bseirani*

In November 1983, Bseirani, who had been out of the country on both business and personal matters, returned to Saudi Arabia. He was by this time very concerned that his interest in SPPI had not yet been formalized and again asked Abou-Khadra to take the steps necessary to remedy that situation. Bseirani testified that Abou-Khadra discussed the matter reluctantly and indicated his unwillingness to formalize Bseirani's ownership interest. Soon thereafter, while Abou-Khadra was out of the country, work at SPPI's finance department ceased on Bseirani's orders, and CSE employees were told not to accept any new orders and to collect all sums owed to CSE in the name of AGBI.

In a letter dated December 19, 1983, Bseirani told Abou-Khadra that their arrangement at CSE violated Saudi law and thus should be terminated. In the same letter, Bseirani demanded that Abou-Khadra formalize Bseirani's interest in SPPI, or alternatively pay Bseirani $7 million. In response, Abou-Khadra sent two letters to Bseirani, both dated December 19, 1983.[2] The first letter stated that Abou-Khadra had never viewed Bseirani as a partner in the SPPI venture, and that Bseirani's participation in CSE was limited to the role of representing several foreign companies in their dealings with CSE. The second letter dismissed Bseirani as general manager of SPPI and revoked Bseirani's work visa, thus obligating Bseirani to leave Saudi Arabia immediately.

[2]One of the letters bears the date "19 Dec., 1963." In context, however, this appears to be a typographical error.

E. *The Settlement*

On March 7, 1984, after a series of negotiations, Bseirani and Abou-Khadra executed an agreement (the "release") pursuant to which Bseirani, AGBI and Pittcon agreed to release Abou-Khadra, CSE and SPPI from all outstanding claims. In return, Abou-Khadra agreed to pay Bseirani $1,600,000. This sum was to be paid in three installments: $600,000 on April 6, 1984; $500,000 on October 6, 1984; and $500,000 on April 6, 1985. Pursuant to the agreement, Abou-Khadra's checks in these amounts were held in escrow by Mahshie.

A second, separate agreement (the "agency agreement") between Bseirani and Abou-Khadra was also executed on March 7, 1984. In this agreement, Bseirani granted Abou-Khadra the right to represent Bseirani in the sale of all preinsulated pipe products in Saudi Arabia for a period of five years. Bseirani was to pay Abou-Khadra a commission of ten percent of the gross sales of all products sold. Bseirani also agreed not to enter into a partnership or grant another license for the manufacture of preinsulated pipe in Saudi Arabia for approximately one year after the agreement was executed. In return, Abou-Khadra appointed Bseirani as his exclusive purchasing agent for all United States preinsulated-pipe products and agreed to pay a commission of ten percent above cost in return for Bseirani's services. Mahshie witnessed this agreement. Bseirani received the first installment of $600,000, pursuant to the terms of the release. However, in October 1984, when the second payment became due, Abou-Khadra directed Mahshie not to release the check because Bseirani was purportedly in breach of the agency agreement.

F. *Litigation History*

Bseirani brought an action against Mahshie in New York State Supreme Court for the release of the funds in escrow. Abou-Khadra, CSE and SPPI then commenced a diversity action in the Northern District against Bseirani, AGBI, Pittcon and Mahshie. It alleged a breach of the CSE arrangement and the agency agreement and sought an injunction barring Mahshie from turning over the two checks remaining in escrow to Bseirani. Bseirani's state court action was settled when Mahshie deposited the two remaining checks into the District Court for the Northern District. In their answer, Bseirani, AGBI and Pittcon asserted seventeen separate counterclaims against Abou-Khadra, CSE and SPPI. The counterclaims were for: (1) an accounting as to CSE for Abou-Khadra's seizure of the business, (2) an accounting as to SPPI for Abou-Khadra's seizure of the business, (3) fraud and conspiracy to defraud Bseirani through the operation of these businesses and the joint business venture, (4) civil RICO violations in the operation of CSE, (5) civil RICO violations in the acquisition and operation of SPPI, (6) civil RICO violations in the operation of the joint Bseirani/Abou-Khadra business venture, (7) tortious interference with employment agreements by enticing Bseirani's employees to work for Abou-Khadra and to convey proprietary information, (8) breach of constructive trust obligations for refusal to recognize Bseirani's contributions to CSE and SPPI, (9) unjust enrichment, (10) conversion of money and property belonging to Bseirani, (11) quantum meruit, (12) trademark infringement of Bseirani's mark "Pittcon," (13) injury to Bseirani's business reputation by the denial that Bseirani was the sole owner of CSE and that he had a forty-nine percent interest in SPPI in violation of New York General Business Law § 368-d, (14) unfair competition through

Abou-Khadra's misappropriation of Bseirani's trademark and trade secrets, (15) declaratory judgment as to the true extent of Bseirani's ownership in CSE and SPPI, (16) breach of the release, and (17) breach of contract. In addition, Bseirani, AGBI and Pittcon sued Mahshie and Deeb asserting claims that in large part mirrored the counterclaims asserted against Abou-Khadra, CSE and SPPI. The claims asserted against both Mahshie and Deeb were for fraud and conspiracy to defraud, civil RICO in the conduct of CSE, civil RICO in the conduct of SPPI, and civil RICO in the conduct of the joint Abou-Khadra/Bseirani business venture. A claim of breach of duty of honesty and fair dealing was asserted against Deeb only. Claims of breach of fiduciary duties of an escrow agent, conversion of the escrowed settlement funds, and legal malpractice were asserted only against Mahshie.

After a four-week trial, the jury returned a general verdict supplemented by answers to eighty-eight special interrogatories. The jury found against Abou-Khadra, CSE, and SPPI on each of the claims asserted in their suit against Bseirani, AGBI, Pittcon, and Mahshie. On the counterclaims of Bseirani, AGBI, and Pittcon, the jury found Abou-Khadra liable on the two accounting claims (1 & 2), the fraud and conspiracy to defraud claims (3), for civil RICO violations (4-6), for unjust enrichment (9), for conversion (10), for quantum meruit (11), and for breach of the release (16). With respect to the counterclaims against CSE and SPPI, both were found liable for an accounting (1 & 2), for unjust enrichment (9), for conversion (10), and for quantum meruit (11). On Bseirani's claims against Deeb and Mahshie, both were found liable for fraud and conspiracy to defraud, as well as for some of the civil RICO claims. In addition, Deeb was found liable for a breach of a duty of

honesty and fair dealing, and Mahshie was found liable for breach of fiduciary duty, conversion, and malpractice.

Abou-Khadra, Deeb and Mahshie were all also held liable for punitive damages. Following his denial of appellants' various motions for judgment notwithstanding the verdict and for a new trial, Judge Munson entered judgment against all of the appellants on August 30, 1991, for the amounts listed *supra* in note 1. Abou-Khadra, of CSE, SPPI, Deeb and Mahshie now appeal from that judgment.[3] Bseirani, AGBI and Pittcon cross-appeal.

DISCUSSION

A. *The Appeal*

1. *Abou-Khadra, CSE, and SPPI*

Abou-Khadra, CSE, and SPPI contend that the jury's answers to the interrogatories were internally inconsistent as well as inconsistent with the general verdict. They argue that these inconsistencies necessitate a new trial.

Abou-Khadra, CSE, and SPPI first challenge the judgment entered by Judge Munson insofar as it awarded Bseirani, AGBI and Pittcon $1 million for the breach of the release (counterclaim 16),[4] while simultaneously awarding over $3 million on the claims underlying the release (counterclaims 1-6 & 9-11). This judgment was entered in accordance with the juror interrogatories, which found Abou-

[3]Abou-Khadra, CSE, and SPPI do not appeal the jury verdict insofar as it found against them on their claims against Bseirani, AGBI, Pittcon and Mahshie.

[4]The amount of the judgment entered against CSE and SPPI by Judge Munson did not include this $1 million.

Khadra liable both for the breach of the March 1984 release and for the claims underlying that agreement.

Although the award of damages both for the breach of the release and on the underlying claims is obviously troubling, the double award did not result from an inconsistency among the jury's answers to the interrogatories or between those answers and the general verdict. Rather, it resulted from the district judge's instruction to the jury that it was not to consider the release as a bar to liability on any of the other claims that Bseirani, AGBI and Pittcon had asserted against Abou-Khadra, CSE, and SPPI. The jury's answers to the interrogatories, and its general verdict, were consistent with this instruction.

The real issue is whether this instruction, the corresponding interrogatories, and the judgment, all of which allowed damages to be awarded against Abou-Khadra both for the breach of the release and on the underlying claims, were in error. However, no timely objection was made to the instruction or to the interrogatories in the district court,[5] and we may reverse on this ground only if "the district court committed plain error in its charge and interrogatories." *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 636 (2d Cir. 1986). An error is plain if it results in a miscarriage of justice, or if it is an obvious instance of misapplied law. *Air et Chaleur, S.A. v. Janeway*, 757 F.2d 489, 494 (2d Cir. 1985).

In support of their argument, Abou-Khadra, CSE and SPPI rely on New York General Obligations Law Section 15-501.3, which requires a litigant to select his or her remedy—either damages for the breach of a release or damages on the underlying claims. *See Plant City Steel Corp. v.*

[5]Abou-Khadra, CSE, and SPPI raised the issue only in a post-trial Rule 49(b) motion.

National Mach. Exch., Inc., 23 N.Y.2d 472, 477 (1969). Section 15-501.3 states that

> [i]f an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord, or to assert his right under the accord.

N.Y. Gen. Oblig. Law § 15-501.3 (McKinney 1989).[6] Abou-Khadra, CSE, and SPPI argue that this provision bars recovery on what are mutually exclusive claims and requires a litigant to elect his or her remedy—either compensation for the breach of the accord, or damages on the claims that underlie the accord. We agree. Indeed, to allow recovery on both claims would result in a partial double recovery.[7] Because a double recovery is an obvious mistake of law, the

[6]The release, which was signed in New York, and which affects the rights of New York citizens, is governed by New York law.

[7]Bseirani, AGBI, and Pittcon argue that the failure of Abou-Khadra, CSE, and SPPI to raise the release as an affirmative defense waived their right to make the double recovery argument. They rely on Rule 8(c) of the Federal Rules of Civil Procedure, which states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively . . . release . . . and any other matter constituting an avoidance or affirmative defense," and to the general rule in federal courts that the failure to plead an affirmative defense results in a waiver of that defense. *See Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 n.2 (2d Cir. 1988); *see also* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 (2d ed. 1990). However, this rule has no bearing on the argument that, if Bseirani, AGBI, and Pittcon

(Footnote continued on next page.)

district court's entering of a judgment that disregarded Section 15-501.3 was plain error.

Abou-Khadra, CSE, and SPPI ask us to remand for a new trial. We do not agree that a remedy so wasteful of judicial resources is appropriate in light of the fact that Abou-Khadra, CSE, and SPPI failed to raise this issue in a timely manner in the district court. Had they done so, Bseirani, AGBI, and Pittcon would have had to elect which claim—damages for the breach of the release or damages on the underlying claims—went to the jury. *See Plant City Steel,*

(Footnote continued.)
are allowed to collect damages both for the breach of the release and on the underlying claims, they will be allowed a partial double recovery. This is not an affirmative defense to liability, but rather an argument about the propriety of an award of full damages on two mutually exclusive claims.

Bseirani, AGBI, and Pittcon alternatively contend that the March 1984 release is not an executory accord, and thus that their execution of the release does not subject them to the limitations of Section 15-501.3. An executory accord is an "agreement embodying a promise express or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation . . . and a promise express or implied to render such performance in satisfaction or in discharge of such claim, cause of action, contract, [or] obligation. . . ." N.Y. Gen. Oblig. Law § 15501.1 (McKinney 1989). Bseirani, AGBI, and Pittcon argue that the release is not an executory accord because, in return for the $1,600,000 payment, they agreed not only to release present claims but also to undertake the terms of the agency agreement. We disagree. Although the executory accord must release present claims, nothing in Section 15501.1 prevents it from doing more, as is often the case with settlements. Thus, even if the agency agreement formed part of appellees' consideration for the release, this fact alone does not prevent the release from functioning as an executory accord within the meaning of Section 15501.3.

23 N.Y.2d at 477 (Proper procedure under Section 15-501.3 "requires the court to determine the accord issue. If the accord has been breached the plaintiff can make his election."). Having not raised the issue in a timely fashion,Abou-Khadra, CSE, and SPPI are in no position to ask for a new trial.

However, the double recovery can be remedied without a new trial. Under Section 15-501.3, Bseirani, AGBI, and Pittcon were entitled to collect damages either for the breach of the release or on the claims underlying the release. We can, without expending resources on a new trial, simply order on remand to the district court exclusion from the judgment against Abou-Khadra (the only party against whom a $1 million judgment for breach of the release was entered, *see* Note 4, *supra*) of the $1 million in damages awarded for breach of the release. This gives Bseirani, AGBI, and Pittcon the higher of the two overlapping awards. Another $600,000 must also be excluded as a credit to Abou-Khadra for the payment actually made under the release. Corresponding adjustments for punitive damages and interest should be made. For similar reasons, $600,000 should be subtracted from the judgments against CSE and SPPI, who were also parties to the release.

Abou-Khadra next argues that the jury's answers to interrogatories regarding the various RICO claims were inconsistent. The jury found that Abou-Khadra had conducted the overall business venture between himself and Bseirani through a pattern of racketeering activity, in violation of 18 U.S.C. §§ 1962(c), 1964(c). But the jury found that Abou-Khadra had not conducted CSE or SPPI through a pattern of racketeering activity. Abou-Khadra argues that these answers were inconsistent because there was no evidence that the business venture had any meaning or activity apart from CSE and SPPI. Accordingly, Abou-Khadra asks us to vacate

the portion of the judgment corresponding to the finding that he had conducted the overall business venture through a pattern of racketeering activity and to remand for a new trial.

It is unclear whether this claim was raised in the district court. However, we need not reach that question because, even if there was an inconsistency in the jury's answers to the RICO interrogatories, Abou-Khadra was in no way harmed as a result. The jury awarded Bseirani $1,930,500 as damages flowing from Abou-Khadra's conduct of the overall business activity, but it also found that Bseirani had suffered the same $1,930,500 in damages as a result of Abou-Khadra's acquisition of SPPI through a pattern of racketeering activity. Abou-Khadra does not challenge this latter verdict. Judge Munson, in entering judgment against Abou-Khadra, did not double count the damages found as a result of both RICO violations. Rather, because the jury had held that the two RICO damage awards were coextensive, as, well as with amounts awarded on other claims against Abou-Khadra, Judge Munson made a single award of $1,930,500 (trebled) to account for Abou-Khadra's entire RICO liability. Any inconsistency in the jury's findings was thus harmless.

Abou-Khadra next argues that the jury instruction on the definition of a RICO enterprise did not adequately explain the requirements for the overall business relationship between Abou-Khadra and Bseirani to qualify as an "association-in-fact" and thus a RICO enterprise. Abou-Khadra never objected to the instruction below and, even if the

instruction given was improper, it had no effect on the amount of the judgment against Abou-Khadra for reasons stated above.[8]

Finally, Abou-Khadra argues that the district court should not have permitted Bseirani to recover for fraud and RICO violations that, Abou-Khadra asserts, were simply claims that the CSE and SPPI contracts were breached. *See Highland Sec. Co. v. Hecht*, 145 A.D.2d 393 (N.Y. App. Div. 1988). This claim also was not raised in the district court and hardly constitutes plain error. There was evidence that false representations were made by Abou-Khadra to induce

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[8]Judge Munson instructed the jury that, in considering the RICO conspiracy charges "[it is not necessary for you to find that any mail and wire fraud acts were actually committed when you are considering the conspiracy charged." Appellants contend that this instruction was improper because we have held that "[b]ecause a conspiracy—an agreement to commit predicate acts—cannot by itself cause any injury, we think that Congress presupposed injury-causing overt acts as the basis of civil standing to recover for RICO conspiracy violations . . . although an overt act by itself (whether or not injury ensues) is not a requisite element of a section 1962(d) criminal conspiracy violation . . . injury from an overt act is necessary and sufficient to establish civil standing for a RICO conspiracy violation." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (citations omitted). However, no one objected to this instruction in the district court, and we can reverse only if it was plain error.

The instruction was not plain error. Hecht held only that a RICO plaintiff may not recover damages for acts that are not predicate racketeering acts. Appellants' fear that the jury might have awarded such damages in the instant matter is groundless. Reading the instructions as a whole, we are satisfied that the jury was clearly informed of the various alleged acts that might support an award of damages.

Bseirani to invest in SPPI. Whether, if the issue had been pursued at trial, the district court would have perceived the issue as a breach of contract is thus unclear, and we find no plain error justifying a retrial. In sum, we affirm the findings of liability as to Abou-Khadra, CSE, and SPPI. However, we vacate the judgment entered against Abou-Khadra and remand to the district court to modify that judgment by subtracting $1,600,000 from its compensatory portion, with a corresponding adjustment for interest, and by subtracting $1 million from its punitive portion that relates to the breach of the release, again with a corresponding adjustment for interest. Six hundred thousand dollars must also be subtracted from the judgments against CSE and SPPI, for reasons stated above. In making these modifications, the district court should clarify the extent to which the judgments against Abou-Khadra, CSE, and SPPI are overlapping awards of damages, and ensure that Bseirani, AGBI, and Pittcon do not recover two or three times for the same injury.[9]

2. *Tony Deeb*

Deeb was found liable for fraud and conspiracy to defraud, conspiracy to acquire from Bseirani a forty-nine percent interest in SPPI through a pattern of racketeering activity, conspiracy to conduct the overall business venture between Abou-Khadra and Bseirani through a pattern of racketeering activity, and breach of a duty of honesty and fair dealing. Punitive damages were also assessed against Deeb. He makes numerous claims on appeal, many of which

[9]The judgment could be read to permit Bseirani, AGBI, and Pittcon to recover for the same injury three times, first from Abou-Khadra, then from CSE, and then from SPPI. No one involved in this litigation intended such a result.

were raised by Abou-Khadra, CSE, and SPPI. However, because we agree with Deeb's contention that there was insufficient evidence to support any of the findings against him, we discuss only his insufficiency claim.

After the jury returned with its verdict, Deeb moved for a judgment notwithstanding the verdict on the ground that there was insufficient evidence to support the verdict against him. This motion was denied, and Deeb argues on appeal that its denial was in error. In reviewing the denial of a motion for a judgment notwithstanding the verdict, the "evidence must be viewed in the light most favorable to the party against whom the motion was made, and that party must be given the benefit of all reasonable inferences that might have been drawn in his favor from the evidence." *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 712 (2d Cir. 1983). Moreover, we may reverse the denial of a motion for judgment notwithstanding the verdict only if "the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970).

Although Deeb bears a heavy burden, we believe that the denial of the motion here was error. Bseirani's case against Deeb consisted in large part of Bseirani's testimony that Deeb failed to obtain a receipt from Abou-Khadra for the $500,000 check drawn on Bseirani's Swiss bank account and deposited in SPPI's account. However, there is no evidence that Deeb's failure to obtain that receipt harmed Bseirani. Bseirani had both the cancelled check and a bank receipt indicating that the check had been deposited into SPPI's account. Moreover, the internal financial records of SPPI, which became available to Bseirani, listed the deposit as "owner's equity," in substance exactly what a receipt

would have indicated. We therefore fail to perceive how Bseirani was harmed by Deeb's failure to obtain a receipt.

The only other evidence against Deeb is his participation in February 1982 discussions concerning the timing of Bseirani's formalization of his interest in SPPI. Bseirani asserts that during these conversations Deeb fraudulently recommended that Bseirani postpone the formalization of his interest in SPPI in order to increase the likelihood that the Saudi Industrial Development Fund loan would be approved. Bseirani contends that this advice was incorrect and that the chances of receiving the loan would have been improved if Bseirani's interest had been formalized immediately. However, the testimony that Deeb in fact told Bseirani to postpone formalization in order to better the chances that the loan would be approved is thoroughly undermined by a February 1982 memorandum Deeb sent to Bseirani. The memorandum outlined the advantages and disadvantages of immediate formalization of Bseirani's interest in SPPI. Among other things, it stated that an advantage to formalization was that "SIDF [Saudi Industrial Development Fund] will look more favorably on the venture." While the memorandum concluded with a recommendation that formalization be postponed, the reason for this recommendation was Deeb's understanding that postponement would "save time and money." The existence of the written memorandum belies any claim by Bseirani of being misled. The advice given in the memorandum was explicitly a close judgment call and did not amount even to an untrue statement, much less fraud or breach of a fiduciary obligation.

We thus hold that there was insufficient evidence against Deeb to support the jury's verdicts against him, and we reverse the judgment against him in its entirety and order dismissal of the claims against him.

3. *George T. Mahshie*

Like Deeb, Mahshie was also found liable for fraud and conspiracy to defraud, conspiracy to acquire from Bseirani a forty-nine percent interest in SPPI through a pattern of racketeering activity, and conspiracy to conduct the overall business venture between Abou-Khadra and Bseirani through a pattern of racketeering activity. In addition, Mahshie was found to have breached his fiduciary duty as an escrow agent, to have converted the $1 million that Bseirani was to receive under the release, and to have committed legal malpractice with regard to Bseirani's dealings with Abou-Khadra.

The portion of the judgment against Mahshie based on RICO must be reversed. The district court stated to the jury, over Mahshie's objection, "Mr. Mahshie is a 2 percent owner of SPPI, according to the proof, [and] CSE and was associated with the Bseirani/Abou-Khadra business venture. . . . I, therefore, instruct you that you must find that the Abou-Khadra parties' association with the three enterprises alleged has been established." The district court thus took from the jury the issue of whether Mahshie was associated with RICO enterprises. Mahshie, however, denied during the trial that he was a two-percent owner of SPPI or that he had any connection to the Bseirani/Abou-Khadra joint venture. Although there was strong evidence that Mahshie had once claimed to be a two-percent owner of SPPI, there was also evidence that Bseirani had denied that Mahshie was an owner. Mahshie should have been allowed to go to the jury on the issue of his ownership, and the district court's refusal to allow him to do so was error.

Moreover, there is considerable evidence that the jury was confused as to Mahshie's liability for damages under RICO. As noted, the jury was given an interrogatory form

containing eighty-eight separate questions. This interrogatory form concluded with three "summary" questions, the third of which asked the jury to determine "[t]otal compensatory damages to Abdallah G. Bseirani, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation on their claims [against Deeb and Mahshie]." The purpose of this final question was to have the jury total the compensatory damages for which Deeb and Mahshie were liable under RICO. The jury had specifically found that both Deeb and Mahshie had committed a variety of actionable wrongs against Bseirani, AGBI, and Pittcon and that Bseirani, AGBI, and Pittcon had been harmed as a result. In answering the interrogatories related to the damage caused by such wrongs, the jury answered that the damages were the same as those listed in interrogatories related to Abou-Khadra. In answer to the summary question, however, the jury stated "[p]unitive damages only."

The court, understandably concerned about the seeming inconsistency between the jury's answers to the interrogatories and its answer to the third summary question, asked the jury to reconsider its answer to that question. Judge Munson thus stated to the jury:

> I would like to have you answer a question for the parties to this case and the Court . . . whether you intended that there are no damages [against Deeb and Mahshie] whatsoever, no compensatory damages whatsoever, or whether you were saying by punitive damages only which was your answer to that question, that you did not wish the verdict to be in excess of the $4,130,500, in other words, if you were to take the answers to the questions that applied only to [Deeb and Mahshie], are you saying that since we have already awarded damages in the total amount

> that we wish to award damages, we are, therefore, finding no compensatory damages [against Deeb and Mahshie].

After returning to the jury room for deliberation, the jury came back to the courtroom and through its foreperson responded "zero, punitive only." Faced with this response, and his conviction that a finding of zero compensatory damages could not be harmonized with the jury's answers to the interrogatories, Judge Munson entered judgment against Deeb and Mahshie according to the jury's answers to the interrogatories. This was done pursuant to Rule 49(b), which provides that, "[w]hen the answers [to the interrogatories] are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict." Fed. R. Civ. P. 49(b). As a result, judgment for $12,625,581.46 ($4,130,500 trebled plus interest) in compensatory damages was entered against Mahshie. In addition, another $770,897.26 (including interest) in punitive damages was assessed against Mahshie.

The existence of juror confusion is undeniable. In each instance in which the jury assessed damages against Deeb or Mahshie, it stated that these damages were included in damages already awarded to Bseirani, AGBI, or Pittcon under one of the counterclaims asserted against Abou-Khadra, CSE, or SPPI. The answers may have been an attempt by the jury to avoid double or triple recoveries. However, Judge Munson had instructed the jury not to concern itself about the cumulation of damages, and this possible explanation is therefore sheer speculation.

In any event, the jury's answer to Judge Munson's post-verdict question—"zero [compensatory damages], punitive

only"—is quite unsettling in the context of a $12.6 million judgment for compensatory damages. Rule 49(b) does allow the trial judge to enter a judgment based on the answers to specific interrogatories where those answers find facts that compel a result as a matter of law that is inconsistent with the general verdict. *See Elliott v. Watkins Trucking Co., Inc.*, 406 F.2d 90 (7th Cir. 1969). The theory is that the jury, having found such facts, must have reached the general verdict by erroneous legal reasoning that the judge is entitled to correct. However, Rule 49(b) also authorizes the district court to "return the jury for further consideration of its answers and verdict or may order a new trial." We believe that under the present circumstances the district judge should have embraced one of these latter options rather than have entered a judgment for compensatory damages. Whatever might have been the proper course before asking the jury to reconsider its answers, once the jury came back with the answer "zero [compensatory damages], punitive only," the matter should have been pursued. It is not at all clear that the jury was committing an error in legal reasoning that was corrected by entry of the $12.6 million judgment. Moreover, based on this record, a finding that Mahshie caused no monetary loss but is liable for over $700,000 in punitive damages is astonishing. What is clear is that confusion existed, and a clarification should have been sought, perhaps by submitting reframed special verdict questions.

Finally, we believe the breach of fiduciary duty, conversion, and malpractice claims against Mahshie must also be retried. The instruction from the court indicating that Mahshie had a two-percent interest in SPPI affected these claims as well as the RICO claims. One thread running throughout Bseirani's case was the contention that Mahshie was acting in league with Abou-Khadra for his, Mahshie's, own inter-

est. The issue of his ownership interest in SPPI—a possible motive for the alleged wrongdoing—was obviously related to this contention, and the court's erroneous instruction regarding it was thus prejudicial.

If Bseirani, AGBI, and Pittcon have a verdict on retrial, care must be taken that they are not awarded a double recovery. Some of the claims against Mahshie concern the administration and enforcement of the settlement agreement. Although we see no barrier to the pursuit of such claims, Bseirani, AGBI, and Pittcon may not, for reasons stated, recover compensatory damages on such claims in excess of those awarded on the claims underlying the settlement agreement.

B. *The Cross-Appeal*

In their cross-appeal, Bseirani, AGBI, and Pittcon challenge only one aspect of the proceedings below—Judge Munson's refusal to award prejudgment interest on the RICO damage awards. Judge Munson refused to award prejudgment interest because he believed that the trebling of the RICO damages adequately compensated Bseirani, AGBI, and Pittcon for the loss of the use of their money during the prejudgment period.

Since the RICO statute does not contain any provisions concerning the award of prejudgment interest, the district court had discretion as to whether to award such interest. *See Lodges 743 and 1746, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446 (2d Cir. 1975) ("Whether to award prejudgment interest in cases arising under federal law has in the absence of a statutory directive been placed in the sound discretion of the district courts."), *cert. denied*, 429 U.S. 825 (1976). Bseirani, AGBI, and Pittcon have offered no cogent reason why Judge Munson's

decision not to award prejudgment interest abused that broad discretion.

CONCLUSION

We affirm the jury's findings of liability as to Abou-Khadra, CSE, and SPPI. However, we vacate the judgment entered against these three, and remand to the district court to reenter judgment consistent with the modifications discussed in this opinion. We reverse the judgment entered against Deeb in its entirety and order the complaint against him dismissed. And finally, we reverse and remand for a new trial the claims against Mahshie.

APPENDIX B—Order dated November 29, 1993 of The United States Court of Appeals for the Second Circuit Amending Opinion of September 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of November, one thousand nine hundred and ninety-three.

ISMAIL ABOU-KHADRA; CONTRACTORS SERVICES ESTABLISHMENT; and SAUDI PREINSULATED PIPES INDUSTRIES,

Plaintiffs-Appellants-Cross-Appellees,

v.

GEORGE T. MAHSHIE,

Defendant,

ABDALLAH G. BSEIRANI; AGB INTERNATIONAL MANAGEMENT CORPORATION; and PITTCON PREINSULATED PIPES CORPORATION,

Defendants-Appellees-Cross Appellants.

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANAGEMENT CORPORATION, and PITTCON PREINSULATED PIPES CORPORATION,

Plaintiffs-Appellees-Cross-Appellants,

v.

WASFIEH ABOU-KHADRA,

Defendant,

GEORGE T. MAHSHIE and TONY DEEB,

Defendants-Appellants-Cross-Appellees.

Present:

Honorable Jon O. Newman,
Honorable J. Edward Lumbard,
Honorable Ralph K. Winter,
Circuit Judges.

Docket Nos. 91-7961, 91-9153, 91-9193, 91-9195

It is now hereby ordered that the opinion issued in this case, *Ismail Abou-Khadra v. Abdallah G. Bseirani,* No. 91-7961(L), slip op. at 8403 (2d Cir. Sept. 9, 1993), be amended as follows:

Page 8421, line 17: Replace the figure "$600,000" with the figure "$1,600,000."

s/JON O. NEWMAN
HON. JON O. NEWMAN, U.S.C.J.

s/J. EDWARD LUMBARD
HON. J. EDWARD LUMBARD,
U.S.C.J.

s/RALPH K. WINTER
HON. RALPH K. WINTER, U.S.C.J.

United States Court of Appeals
Second Circuit
Filed Nov. 29, 1993
Elaine B. Goldsmith, Clerk

APPENDIX C—Order dated December 21, 1993 of The United States Court of Appeals for the Second Circuit Denying Petitioners' Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21 day of December, one thousand nine hundred and ninety three.

ISMAIL ABOU-KHADRA; CONTRACTERS SERVICES ESTABLISHMENT; and SAUDI PREINSULATED PIPES INDUSTRIES,

Plaintiffs-Appellants-Cross Appellees,

v.

GEORGE T. MAHSHIE,

Defendant,

ABDALLAH G. BSEIRANI; AGB INTERNATIONAL MANAGEMENT CORPORATION; and PITTCON PREINSULATED PIPES CORPORATION,

Defendants-Appellees-Cross-Appellants.

ABDALLAH G. BSEIRANI; AGB INTERNATIONAL MANAGEMENT CORPORATION; and PITTCON PREINSULATED PIPES CORPORATION,

Plaintiffs-Appellees-Cross-Appellants,

v.

WASHFIEH ABOU-KHADRA,

Defendant,

GEORGE T. MAHSHIE and TONY DEEB,

Defendants-Appellants-Cross-Appellees.

Docket Nos. 91-7961, 91-9153, 91-9193, 91-9195

Present:

Hon. J. Edward Lumbard
Hon. Jon O. Newman
Hon. Ralph K. Winter
CIRCUIT JUDGES

A petition for rehearing having been filed herein by Defendants-Appellees-Cross-Appellants ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANGEMENT CORPORATION and PITTCON PREINSULATED PIPES PIPES CORPORATION,

Upon consideration by the panel therof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT,
GEORGE LANGE III, CLERK
By:
s/ CAROLYN CLARK CAMPBELL
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

United States Court of Appeals
Second Circuit
Filed Dec. 21, 1993
George Lange III, Clerk

APPENDIX D—District Court Judgment, dated August 30, 1991

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

ISMAIL ABOU-KHADRA, CONTRACTORS SERVICES ESTABLISHMENT AND SAUDI PREINSULATED PIPES INDUSTRIES,

Plaintiffs,

v.

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANAGEMENT CORPORATION, PITTCON PREINSULATED PIPES CORPORATION and GEORGE T. MAHSHIE,

Defendants.

84-CV-1502

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANAGEMENT CORPORATION and PITTCON PREINSULATED PIPES CORPORATION,

Plaintiffs,

v.

GEORGE T. MAHSHIE, WASFIEH ABOU-KHADRA and TONY DEEB,

Defendants.

85-CV-1337

JUDGMENT

This matter having come before the court for trial of these two actions, which were consolidated by the court, commencing on April 8, 1991, and the jury having returned a verdict with interrogatories on May 6, 1991, and having returned a supplemental jury general verdict with supplemental jury interrogatories on May 9, 1991, the latter addressing the issue of the amounts of punitive damages to award, and the court having rendered a Memorandum-Decision and Order dated July 11, 1991 disposing of post trial motions including the inconsistency between the jury's answers to interrogatories and the general verdicts rendered on May 6 and 7, 1991;

Now, in accordance with the aforesaid Memorandum-Decision and Order which, *inter alia*, directed the entry of judgment, it is hereby

ORDERED, ADJUDGED AND DECREED that the claims of plaintiffs Ismail Abou-Khadra, Contractors Services Establishment ("CSE"), and Saudi Preinsulated Pipes Industries ("SPPI") against defendants Abdallah G. Bseirani, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation in Civil Action No. 84-CV-1502 are dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that defendants Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation shall recover from Ismail Abou-Khadra compensatory damages on their counterclaims in Civil Action No. 84-CV-1502 in the amount of $10,800,692.29. This amount is based on the jury verdict against Ismail Abou-Khadra on the first, second, third, fifth, sixth, ninth, tenth, eleventh, and sixteenth counterclaims in Civil Action No. 84-CV-1502, as follows:

First Counterclaim (Accounting CSE) -	$ 950,000
Second Counterclaim (Accounting - SPPI) -	$1,930,500
Third Counterclaim (fraud and conspiracy to defraud) -	$1,930,500
Fifth Counterclaim (18 U.S.C. §1962) -	$1,930,500
Sixth Counterclaim (18 U.S.C. §1962) -	$1,930,500
Ninth Counterclaim (unjust enrichment) -	$2,880,500

Tenth Counterclaim (conversion) -	$2,880,500
Eleventh Counterclaim (Quantum Meruit) -	$ 250,000
Sixteenth Counterclaim (breach of contract) -	$1,000,000

For purposes of determining the amount of this judgment, the amount of the jury verdict against Ismail Abou-Khadra on the ninth counterclaim in Civil Action No. 84-CV-1502 is deemed to include the amounts of the jury verdict against Ismail Abou-Khadra on the first, second, third, fifth, sixth, and tenth counterclaims in Civil Action No. 84-CV-1502. The jury verdict of $1,930,500 against Abou-Khadra on the counterclaims under 18 U.S.C. §1962 has been trebled once. Interest has been added to the jury verdict against Ismail Abou-Khadra on the ninth counterclaim in Civil Action No. 84-CV-1502 as of December 19, 1983, on the eleventh counterclaim in Civil Action No. 84-CV-1502 as of March 2, 1983, and on the jury verdict against Ismail Abou-Khadra on the sixteenth counterclaim in Civil Action No. 84-CV-1502 as of October 6, 1984.

In addition, Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation shall recover the sum of $4,111,452.10 in punitive damages against Ismail Abou-Khadra (including interest since May 9, 1991), for a total award against Ismail Abou-Khadra in the amount of $14,912,144.29, and shall have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs Abdallah G. Bseirani, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation recover from CSE in Civil Action No. 84-CV-1502, compensatory damages in the amount of $5,318,322.43 on their

various counterclaims in Civil Action No. 84-CV-1502 and that the aforesaid defendants/counter-claimants shall have execution against CSE therefor. This amount is based on the jury verdict on the first, ninth, tenth, and eleventh counterclaims in civil Action No. 84-CV-1502, as follows:

First Counterclaim (Accounting - CSE) -	$ 950,000
Ninth Counterclaim (Unjust Enrichment) -	$2,880,500
Tenth Counterclaim (Conversion) -	$2,880,500
Eleventh Counterclaim (Quantum Meruit) -	$ 250,000

For purposes of determining the amount of this judgment, the amounts of the jury verdict on the first and ninth counterclaims against CSE in Civil Action No. 84-CV-1502 are deemed included in the jury verdict against CSE on the tenth counterclaim in Civil Action No. 84-CV-1502. Interest has been calculated and added to the jury verdict against CSE on the tenth counterclaim in Civil Action No. 84-CV-1502 from December 19, 1983. On the eleventh counterclaim against CSE in Civil Action No. 84-CV-1502, interest has been calculated and added as of March 2, 1983; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs Abdallah G. Bseirani, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation shall recover from SPPI in Civil Action No. 84-CV-1502 compensatory damages in the amount of $5,318,322.43 and that the aforesaid defendants shall have execution therefor. This amount is based on the jury verdict on the second, ninth,

tenth, and eleventh counterclaims in Civil Action No. 84-CV-1502, as follows:

Second Counterclaim (Accounting - SPPI) -	$1,930,500
Ninth Counterclaim (Unjust Enrichment) -	$2,880,500
Tenth Counterclaim (Conversion) -	$2,880,500
Eleventh Counterclaim (Quantum Meruit) -	$ 250,000

For purposes of determining the amount of this judgment, the amounts of the jury verdict against SPPI on the second and ninth counterclaims in Civil Action No. 84-CV-1502 are deemed included in the jury verdict against SPPI on the tenth counterclaim in Civil Action No. 84-CV-1502. Interest has been calculated and added to the jury verdict against SPPI on the tenth counterclaim from December 19, 1983. Interest on the eleventh counterclaim in Civil Action No. 84-CV-1502 has been calculated and added from March 2, 1983; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation shall recover from Tony Deeb compensatory damages on their claims in 85-CV-1337 in the amount of $7,129,574.19. This amount is based on the jury verdict against Tony Deeb on the first, third, fourth, and fifth claims in Civil Action No. 85-CV-1337, as follows:

First Claim (fraud and conspiracy to defraud) -	$1,930,500
Third Claim (18 U.S.C. §1962) -	$1,930,500
Fourth Claim (18 U.S.C. §1962) -	$1,930,500
Fifth Claim (Breach of Duty of Honesty and Fair Dealing) -	$1,930,500

For purposes of determining the amount of this judgment, the amounts of the jury verdict against Tony Deeb on the first, third, and fifth claims against Tony Deeb in Civil Action No. 85-CV-1337 are deemed included in the amount of the jury verdict against Tony Deeb on the fourth claim in 85-CV-1337. The jury verdict of $1,930,500 under 18 U.S.C. §1962 has been trebled once. Interest has been calculated on the jury verdict on the first claim against Tony Deeb in 85-CV-1337 from December 19, 1983.

In addition, plaintiffs Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation shall recover from Tony Deeb punitive damages in the amount of $256,965.75 (including interest from May 9, 1991) for a total award against Tony Deeb in the amount of $7,386.539.94 and shall have execution therefore; and it is further

ORDERED, ADJUDGED AND DECREED that Abdallah G. Bseirani, AGB International Management Corporation and Pittcon International Pipes corporation shall recover against George T. Mahshie compensatory damages on their claims in Civil Action No. 85-CV-1337 in the amount of $12,625,581.46. This amount is based on the jury verdict on the first, third, fourth, seventh, and eighth claims against George T. Mahshie in Civil Action No. 85-CV-1337, as follows:

First Claim (fraud, conspiracy to defraud) -	$1,930,500
Third Claim (18 U.S.C. §1962) -	$1,930,500
Fourth Claim (18 U.S.C. §1962) -	$1,930,500
Seventh Claim (conversion) -	$1,000,000
Eighth Claim (malpractice) -	$4,130,500

For purposes of determining the amount of this judgment, the amount of the jury verdict against George T. Mahshie on the eighth claim in 85-CV-1337 is deemed to include the amount of the jury verdict on the first, third, fourth, and seventh claims against George T. Mahshie in Civil Action No. 85-CV-1337. The jury verdict of $1,930,500 on the third and fourth claims against George T. Mahshie in 85-CV-1337 under 18 U.S.C. §1962 has been trebled once. Interest has been calculated on the jury verdict on the eighth claim against George T. Mahshie in Civil Action No. 85-CV-1337 as of March 16, 1979.

In addition, plaintiffs Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation shall recover from George T. Mahshie punitive damages in the amount of $770,897.26 (including interest from May 9, 1991), for a total award against George T. Mahshie in the amount of $13,396.478.72, and shall have execution therefore; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation shall recover from Ismail Abou-Khadra, CSE, SPPI, Tony Deeb, and George T. Mahshie the additional sum of $15,500 as costs in these two consolidated actions; and it is further

ORDERED, ADJUDGED AND DECREED that the liability of the parties on the compensatory damage awards on

the claims and counterclaims in these two consolidated actions shall be joint and several.

Dated: August 30, 1991

s/GEORGE A. RAY, Clerk
GEORGE A. RAY, Clerk
United States District Court

APPENDIX E—Excerpt from Transcript of October 7, 1991 Bench Decision Denying Motions for New Trial

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

ISMAIL ABOU-KHADRA, CONTRACTORS SERVICES ESTABLISHMENT and SAUDI PREINSULATED PIPE CORPORATION,

-vs-

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL CORPORATION, PITTCON PREINSULATED PIPES CORPORATION and GEORGE T. MAHSHIE

84-CV-1502

BSEIRANI, ABDALLAH G., AGB INTERNATIONAL MANAGEMENT CORPORATION and PITTCON PREINSULATED PIPES CORPORATION,

-vs-

MAHSHIE, GEORGE T., ABOU-KHADRA, WASFIEH, and DEEB, TONY

85-CV-1337

MOTION BY DEFENDANT DEEB FOR A NEW TRIAL;

MOTION BY DEFENDANT MAHSHIE FOR A NEW TRIAL; Proceedings held on October 7, 1991, at the United States Courthouse, Syracuse, New York, before the HON-

ORABLE HOWARD G. MUNSON, Senior United States District Court Judge, Northern District of New York.

APPEARANCES:

JAMES P. FITZPATRICK, ESQ., For the Abou-Khadra parties

KENNETH H. CREWELL, JR., Official U.S. Court Reporter, 100 South Clinton Street, Syracuse, New York 13260, (315) 423-5530

DAVID E. PEEBLES, ESQ. and MARTHA BERRY, ESQ., For Bseirani, AGB parties

VERNER R. LOVE, ESQ., For Defendant Deeb

JAMES D. LANTIER, ESQ., For Defendant Mahshie

(30) (WHEREUPON, THE FOLLOWING OCCURRED IN OPEN COURT.)

The Court: Well, ladies and gentlemen, as I said before but I am going to say it again, just so the record is clear in this case, that the granting of a Rule 59 notion for a new trial is a rather drastic remedy which is only appropriate in limited circumstances. The moving party bears the burden of convincing the Court that the jury has reached a seriously erroneous result, in the verdict. In this case, I refer to special interrogatories, and that a seriously erroneous result must represent a miscarriage of justice. I refer you to *Katara v. D.E. Jones Commodities, Inc.*, at 835 F.2d 966.

Now, the decision as to whether or not to grant a new trial is committed to the informed discretion of the trial court. *Ryder v. City of Topeka* at 814 F.2d 1412. A motion for a

new trial cannot be used to raise arguments which could, and should, have been made before the judgment was issued. *Federal Deposit Insurance Corp. v. Meyer* at 781 F.2d 1260.

Further, a new trial may not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result. *Ward v. City of San Jose,* 737 F. Supp 1502. This includes failure to challenge the (31) consistency of the jury's answers to special interrogatories prior to the discharge of the jury, as this Court has interpreted such failure to be a waiver of objection. And I refer you to the July 11, 1991 Memorandum Decision and Order of this Court at notes 6 and 7, citing *Schaafsma v. Morin Vermont Corp.* at 802 F.2d 629.

Most importantly, Rule 59(a) does not permit a motion for a new trial merely to relitigate old matters or to present the case under new theories. *Evans, Inc. v. Tiffany & Co.,* at 416 F. Supp 224 and *Agola v. Hagner,* 678 P. Supp 988.

With these principles in mind, the Court will address the Rule 59(a) motions made by Defendants Mahshie and Deeb. It appears that movants are attempting through the motions for a new trial to relitigate several issues already decided by this Court. Specifically, the second prong of the movants' argument regarding the purported inconsistency of the jury's findings of liability on both the March 7, 1984 release and the other claims arising during the time period covered by the release, was raised in the post-trial motions and the court determined that such findings were not inconsistent. Again, I refer you to the July 11, 1991 Memorandum-Decision and Order at pages 15 and 16.

Movants are not entitled to (32) relitigate that issue on the instant motions for a new trial despite their assertion of a new theory that Section 15-501.3 of the General Obligations

Law of the State of New York bars dual recovery. I refer you to *Evans, Inc. v. Tiffany & Co.*, at 416 F. Supp at 244.

It is particularly inappropriate for movants to raise the General Obligations Law as a basis for a new trial because neither of them was a party to the March 7, 1984 release and, therefore, neither of them has standing to use that release as a shield to the claims brought against them. Movants' motion for a new trial based on the purported inconsistency in the jury's findings of liability on both the March 7, 1984 release and the other claims which arose during that time period is hereby denied.

Similarly, the Court has already ruled on movants' challange to the cumulation of damages in the first, third, fourth and fifth causes of action in 85-CV-1337. This argument centers around movants' interpretation that the jury's answers to special interrogatories and the jury's general verdict were consistent and that, therefore, no compensatory damages were awarded against Defendants Mahshie and Deeb.

The Court concluded in its July 11, 1991 Memorandum-Decision and Order that Defendants' (33) interpretation was incorrect. Finding that the general verdict and the answers to special interrogatories could not be reconciled, the Court undertook the task pursuant to Rule 49(b) of entering judgment on the special interrogatories. The Court carefully considered the arguments of all of the parties in crafting the judgment, including the August 23, 1991 letter from Mr. Lantier which is incorporated by reference into the instant motions. Movants offer nothing to persuade the Court that a manifest error of law or fact resulted from entry of the judgment in the amounts the Court deemed appropriate based an the jury's answers to the special interrogatories.

Therefore, movants' reassertion of their challenge to the allocation of damages in 85-CV-1337 does not provide grounds for a new trial.

However, movants also argue that the Court should not have entered judgment on the special interrogatories at all. Once the Court opted to recall the jury for further consideration of its answers as compared to the general verdict, and the jury returned with answers which did nothing to clarify the inconsistencies, movants assert that the Court should have ordered a new trial and they cite *Turchio v. D/S A/S Den Norske Africa,* 509 F.2d 101 in support of their argument. They claim the Second Circuit's holding that judgment should be entered on (34) neither the first nor the second verdict when inconsistencies and incomplete answers are present should be applied in this case.

The Court disagrees. As the Bseirani parties point out in opposition to the Rule 59(a) motions, movants conveniently overlook the factual distinctions between *Turchio* and the case at bar. In *Turchio,* the jury rendered its first verdict without answering the two oral interrogatories proffered by the Court. After being sent back to answer the oral interrogatories, the jury returned with incomplete answers. The Court then recharged the jury on the elements of Plaintiff's claim and requested the jury to orally answer a set of six interrogatories. The jury again returned with partial answers which also were inconsistent with the previous partial answers.

Further, the jury delivered a second verdict which was inconsistent with the first. The District Court declared a mistrial which it withdrew to consider motions by the parties and subsequently entered judgment based on the first verdict. It was this entry of judgment fraught with inconsistencies that the Second Circuit rejected.

The *Turchio* factual scenario is quite different from the facts of this case. There is only one verdict here. The written interrogatories were answered (35) completely by the jury, and the subsequent written interrogatories were again completely answered by the jury. The answers to the two sets of interrogatories were consistent, although inconsistent with the general verdict, and it is upon the internal consistency of the interrogatory answers that the Court entered judgment.

When the answers are consistent, the Court is expressly authorized under Rule 49(b) to enter judgment in accordance with the answers, notwithstanding the general verdict. It it only when the answers are internally inconsistent as well as being inconsistent with the general verdict that a count may not enter judgment on either one but rather must order a new trial.

Again, I refer you to *Turchio*. Therefore, the purported mistake of law upon which movants attempt to binge their motions for a new trial is not a mistake of law at all. This Court correctly cited *Turchio* for the proposition that judgment cannot be entered on a general verdict once the jury gives answers to special interrogatories which are inconsistent with that general verdict. Moreover, this Court properly determined that the *Turchio* holding does not preclude the entry of judgment under rule 49(b) in accordance with internally consistent interrogatory answers.

To the extent that movants seek to (36) challenge the Court's exercise of one option under Rule 49(b) in recalling the jury for further consideration and subsequent exercise of another option under that Rule in entering judgment based on the interrogatory answers notwithstanding the general verdict, movants fail to offer any support for their argument. This Court is of the opinion that it has the discretion, indeed the obligation, to act as it did. A trial court has a duty to try to reconcile perceived inconsistencies in jury interrogato-

ries and the general verdict in order to avoid a retrial. I refer you to *Harvey v. General Motors Corp.*, 873 F.2d 1343 at page 1347. In so doing, the Court is not permitted to re-examine the jury's findings of fact, but rather should adopt a view of the case that makes the jury's answers to special interrogatories consistent. *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629.

Wherever possible, inconsistencies should be resolved in favor of sustaining the judgment. *Los Angeles Nut House v. Holiday Hardware Co.*, 825 F.2d 1351. In this case, the court concluded that inconsistencies between the general verdict and the answers to special interrogatories could not be reconciled, but that the jury's findings of fact were internally consistent as evidenced by the special interrogatory answers. Thus, pursuant to its duty to avoid retrial when possible, this

* * *

(38) testimony that Mahshie had a 2 percent ownership in SPPI and, indeed, Mahshie admitted in a tape recorded conversation that he possessed a 2 percent interest. In such an instance, when only one conclusion is reasonably possible, the Court need not submit the question to the jury. I refer you to *West v. State Farm Fire & Casualty Co.*, 868 F.2d 348 and the citations therein. Rather, the Court may answer the question as a matter of law based on the uncontroverted factual evidence. *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123 at page 128.

That is precisely what the Court did in instructing the jury that Mahshie possessed a 2 percent ownership interest in SPPI. The Court is not persuaded that its instruction was an error, nor that the instruction was harmful to Mahshie as none of the claims against him hinged on an actual ownership interest in SPPI. Therefore, Mahshie's final argument for a new trial must fail.

In conclusion, Defendants Mahshie and Deeb failed to present any basis for this Court to grant their motions for a new trial in 85-CV-1337. The August 30, 1991 judgment shall stand as entered. This constitutes the Decision and Order of the Court. No written order shall follow.

Now, you people have a problem, I think, because under subsequent orders of this Court a (39) supersedeas bond must be filed by 5 o'clock this evening. You have ten minutes to do so, ladies and gentlemen, that order still stands.

This constitutes the Decision and Order of this Court. No written order shall follow.

Mr. Peebles: Thank you, Judge.

Court Clerk: Court stands adjourned.

The Court: Thank you.

* * *

CERTIFICATION

I, KENNETH H. CREWELL, JR., do hereby certify that I am an Official Court Reporter for the United States District Court for the Northern District of New York, and that the foregoing is a true and accurate transcript, to the best of my knowledge and belief, of the proceedings held at the time and place as noted in the heading hereof.

s/KENNETH H. CREWELL, JR.
KENNETH H. CREWELL, JR.
Official U.S. Court Reporter
Northern District of New York
100 South Clinton Street
Syracuse, New York 13260

APPENDIX F—Memorandum-Decision and Order of the District Court, dated July 11, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ISMAIL ABOU-KHADRA, CONTRACTORS SERVICES ESTABLISHMENT and SAUDI PREINSULATED PIPES INDUSTRIES,

Plaintiffs,

v.

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANAGEMENT CORPORATION, PITTCON PREINSULATED PIPES CORPORATION and GEORGE T. MASHIE,

Defendants.

84-CV-1502

ABDALLAH G. BSEIRANI, AGB INTERNATIONAL MANAGEMENT CORPORATION, PITTCON PREINSULATED PIPES CORPORATION and GEORGE T. MASHIE,

Plaintiffs,

v.

GEORGE T. MASHIE, WASFIEH ABOU-KHADRA, and TONY DEEB,

Defendants.

85-CV-1337

APPEARANCES:

ARMANI, FITZPATRICK & SNYDER
Attorneys for Ismail Abou-Khadra,
Contractors Services, & Saudi
Preinsulated Pipe
5330 West Genesee Street
Camillus, New York 13031

HANCOCK & ESTABROOK
Attorneys for Abdallah G. Bseirani,
AGB International Management, &
Pittcon Preinsulated Pipes
Syracuse, New York 13202

VERNER R. LOVE, ESQ.
Attorney for Tony Deeb
200 Onondaga Plaza
Syracuse, New York 13202

SMITH, SOVICK, KENDRICK,
SCHWARZER & SUGNET, P.C.
Attorneys for George T. Mashie
Empire Building
Syracuse, New York 13202

HOWARD G. MUNSON, SR. J.
JAMES P. FITZPATRICK, ESQ.
DAVID E. PEEBLES, ESQ.
JAMES D. LANTIER, ESQ.

MEMORANDUM-DECISION & ORDER

Presently before the court are the parties' respective post-trial motions. Ismail Abou-Khadra, Contractors Services Establishment, and Saudi Preinsulated Pipes Industries ("the Abou-Khadra parties") move pursuant to Fed.R.Civ.P. 50(b) for a judgment notwithstanding the verdict ("judgment n.o.v.") or alternatively under Fed.R.Civ.P. 49(b) for a new trial in 84-CV-1502. Defendants Tony Deeb and George T. Mashie move under Rule 49(b) to enter judgment in accordance with the jury's general verdict in 85-CV-1337 of no compensatory damages and pursuant to Rule 50(b) for judgment n.o.v. as to the jury's award of punitive damages. Alternatively, defendants Deeb and Mashie move for judgment n.o.v. with regard to the jury's answers to interrogatories. Abdallah G. Bseirani, AGB International Management Corporation, and Pittcon Preinsulated Pipes Corporation ("the Bseirani parties") move under Rules 49(b) and 54 for the entry of judgment on the jury's answers to interrogatories, notwithstanding the general verdict.[1] Finally, the Bseirani parties move for additional compensatory damages against defendant Mashie.

For the reasons set forth below, the court denies the Abou-Khadra parties' motion for judgment n.o.v. or a new trial in 84-CV-1502; denies defendants Deeb and Mashie's motion to enter judgment on the general verdict and to set aside the jury's award of punitive damages in 85-CV-1337; denies Deeb and Mashie's alternative motion for judgment n.o.v. or a new trial; grants the Bseirani parties' motion for the entry of judgment on the jury's answers to interrogato-

[1]Included within the Bseirani parties' motion for the entry of judgment is a request for treble damages on their claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), prejudgment interest, sanctions against defendant Mashie, and costs.

ries in 85-CV-1337; and denies the Bseirani parties' motion for additional compensatory damages against defendant Mashie.

I. BACKGROUND

The court sets forth only those facts necessary to an understanding of the pending motions. The instant consolidated actions stem from a failed business relationship between Ismail Abou-Khadra and Abdallah G. Bseirani involving the manufacture and sale of preinsulated pipes. The relationship commenced in late 1978 when the two were introduced by defendant Mashie, and continued until the early 1980's when the parties had a falling out over the operation and control of two companies, Contractors Services Establishment ("CSE") and Saudi Preinsulated Pipes Industries ("SPPI").

A jury trial of the consolidated actions was conducted from April 8 through May 9, 1991 in Syracuse, New York.[2] On May 6, 1991, the jury returned a general verdict accompanied by answers to interrogatories awarding no damages to the Abou-Khadra parties on their accounting claims in 84-CV-1502. The jury, however, awarded the Bseirani parties $4,130,500 in compensatory damages on their multiple counterclaims in 84-CV-1502. As to the Bseirani parties' direct claims against defendants Deeb and Mashie in 85-CV-1337, the jury in their general verdict awarded no com-

[2]The court reserved decision on the motions for directed verdict made at the close of the Bseirani parties' proof and at the close of all the proof.

pensatory damages, but did find that the Bseirani parties were entitled to punitive damages.[3]

Upon the return of the jury's verdict, the court and counsel perceived two inconsistencies in the jury's verdict. First, the jury's general verdict of no compensatory damages in 85-CV-1337 was inconsistent with its answers to interrogatories wherein the jury found defendants Deeb and Mashie liable on various claims asserted by the Bseirani parties and awarded compensatory damages. (Interrogatories 10-12, 14, 16, 23-27, 32-36, 66-67, 75-77, 79-82, 84-87). In each instance in which the jury awarded damages against Deeb and Mashie it was found that the damages proximately caused were included in damages awarded to the Bseirani parties under other causes of action. (Interrogatories 11, 15, 26, 35, 76A, 81, 86). Second, the jury's general verdict that the Bseirani parties were not entitled to compensatory damages in 85-CV-1337 was inconsistent with its finding that the Bseirani parties were entitled to punitive damages in 85-CV-1337. No other inconsistencies in the jury's verdict were noted by the court or counsel prior to the discharge of the jury.

In response to the evident inconsistencies in the jury's verdict, the Abou-Khadra parties moved for a mistrial and a new trial, while the Bseirani parties moved under Rules 49(b) and 54 for the entry of judgment on the jury's answers to the interrogatories, notwithstanding the general verdict. Over the parties' objections, the court recalled the jury in an attempt to resolve the inconsistencies. After further deliberations the jury returned and reaffirmed its finding that the

[3]The summary to the jury interrogatory form did not include any question with regard to punitive damages. However, in responding to the amount of compensatory damages that the Bseirani parties were entitled to in 85-CV-1337, the jury responded, "0, punitive only."

Bseirani parties were not entitled to compensatory damages in 85-CV-1337.

On May 9 the court held a punitive damages hearing before the same jury. At the close of the hearing the jury was furnished with a supplemental jury interrogatory form. The jury awarded the Bseirani parties $4,000,000 in punitive damages against Abou-Khadra, $250,000 in punitive damages against defendant Deeb, and $750,000 in punitive damages against defendant Mashie.

II. DISCUSSION

A. *Rule 49(b) Motions*

The court first addresses the motions related to the entry of judgment under Rule 49(b). As noted, the Bseirani parties renew their motion for the entry of judgment on the jury's answers to the interrogatories, notwithstanding the general verdict. Defendants Deeb and Mashie move for the entry of judgment on the jury's general verdict of no compensatory damages in 85-CV-1337 on the ground that the jury's general verdict is consistent with its answers to the interrogatories. Finally, Ismail Abou-Khadra moves for a new trial, contending that the jury's answers to the interrogatories are internally inconsistent.

Rule 49(b) authorizes a district court to submit to the jury a general verdict form accompanied by written interrogatories on issues of fact necessary to the verdict. Depending upon the nature of the jury's general verdict and answers to interrogatories, Rule 49(b) specifies the appropriate judicial response, as follows:

> When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment may not be entered, but the court shall return the jury for further consideration of its answers or shall order a new trial.

It is well-settled that under Rule 49(b) the court has an affirmative obligation to attempt to resolve apparent inconsistencies in the jury's verdict. *See Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119 (1963); *Harvey by Harvey v. General Motors Corp.*, 873 F.2d 1343, 1347 (10th Cir. 1989); *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 634-35 (2d Cir. 1986); *Julien J. Studley, Inc. v. Gulf Oil Corp.*, 407 F.2d 521, 527 (2d Cir. 1969). "Every reasonable interpretation should . . . be indulged in favor of the general verdict in an effort to harmonize it with the answers to the interrogatories, and the latter should be held controlling only 'where the conflict on a material question is beyond reconciliation on any reasonable theory consistent with the evidence and its fair inferences.'" 5A *Moore's Federal Practice* ¶ 49.04, at 49-58 (citation omitted).

The Bseirani parties contend that the jury's answers to the 88 interrogatories are internally consistent. The only inconsistency, they argue, is between the answers to the inter-

rogatories finding liability and awarding damages against Deeb and Mashie and the general verdict in 85-CV-1337 awarding no compensatory damages. Accordingly, the Bseirani parties move under Rule 49(b) for the entry of judgment on the jury's answers to the interrogatories, notwithstanding the general verdict. The Bseirani parties argue in the alternative that even if the jury's answers to the interrogatories are inconsistent in certain respects, such inconsistencies have been waived because opposing counsel did not raise them before the discharge of the jury.

In opposition to the Bseirani parties' motion and in support of their own motions for the entry of judgment, defendants Deeb and Mashie first argue that the jury's answers to the interrogatories and its general verdict in 85-CV-1337 are not inconsistent. They contend that the general verdict reflects the jury's assessment that the damages awarded against Abou-Khadra on Bseirani's claims for accounting, *quantum meruit*, and breach of the general release contract were sufficient to compensate Bseirani for his losses. Therefore, they assert that the court should enter judgment on the general verdict in 85-CV-1337. Alternatively, Deeb and Mashie, as well as Abou-Khadra, challenge the Bseirani parties' contention that the jury's answers to interrogatories are internally consistent. The first inconsistency that is raised is with respect to the jury's findings on the Bseirani parties' RICO claims. They assert that the jury's determination that Abou-Khadra conducted the Abou-Khadra/Bseirani business venture through a pattern of racketeering and that Deeb and Mashie conspired with him (Interrogatories 32-34), are inconsistent with the jury's findings that Abou-Khadra did not conduct either CSE or SPPI through a pattern of racketeering. (Interrogatories 19 & 28). Abou-Khadra, Deeb, and Mashie also contend that the jury's answers related to the March 7, 1984 general release agree-

ment are inconsistent with the jury's finding of liability and award of damages on the Bseirani parties' other claims.

1. *Consistency of the Interrogatory Answers and the General Verdict*

Contrary to defendants Deeb and Mashie's contention, the jury's answers to the interrogatories and its general verdict in 85-CV-1337 of no compensatory damages cannot be reasonably reconciled. In its answers to interrogatories 10, 14, 25, and 34, the jury made specific findings that Deeb and Mashie committed fraud and conspiracy to defraud, and violated RICO. As to each of these claims the jury found that Bseirani was damaged in an amount which was included in the amount of damages that was awarded to the Bseirani parties on their accounting claim against Abou-Khadra in connection with SPPI, namely, $1,930,500. (Interrogatories 11, 15, 26, 35). With respect to Bseirani's claims directed only against defendant Mashie, the jury found that Mashie breached his fiduciary duty as escrow agent, (Interrogatory 66);[4] converted two checks which proximately caused damage to Bseirani in the amount of $1,000,000 (Interrogatories 79 & 80); and committed legal malpractice toward the Bseirani parties which proximately caused damages in the amount of $4,130,500 (Interrogato-

[4]Pursuant to a pre-trial stipulation of the parties, the Bseirani parties' claim against Mashie for breach of his duty as an escrow agent was submitted to the jury only on the question of liability. Assuming a finding of liability, the parties agreed to submit the question of the amount of damages, if any, flowing from such breach to the court. Because the jury found that Mashie did breach his fiduciary duty, the Bseirani parties have moved for additional compensatory damages. The court addresses this issue later in this opinion. *See infra* at 22.

ries 84-85). Again, the jury found that the damages flowing from defendant Mashie's conversion and legal malpractice were included in damages awarded to the Bseirani parties under other causes of action. (Interrogatories 81 & 86). Finally, the jury found that defendant Deeb breached his duty of loyalty and fair dealing and proximately caused damage to Bseirani in the amount of $1,930,500, which again was included in damages awarded to Bseirani under other causes of action. (Interrogatories 75-77).

Despite these specific findings of liability and damages against Deeb and Mashie, the jury, when summarizing its findings, determined that the Bseirani parties were not entitled to any compensatory damages. These results are patently incompatible. Even if the court were to assume, as suggested by Deeb and Mashie, that the jury concluded that the amount of damages awarded to Bseirani on its claims against Abou-Khadra adequately compensated Bseirani for all his losses, this does not explain the jury's general verdict in 85-CV-1337. Because Bseirani's claims against Deeb and Mashie were asserted in an action separate from Bseirani's claims against Abou-Khadra, the jury's specific finding that Deeb and Mashie were liable on certain causes of action and caused damages should have resulted in a general verdict in 85-CV-1337 reflecting the amount of damages caused by Deeb and Mashie, irrespective of the amount of damages awarded in 84-CV-1502. The jury's award of no compensatory damages reflects the difficulty it had in sorting out the amount of damages owing to the Bseirani parties in the two overlapping lawsuits. Unfortunately, the court's recall of the jury after it returned its verdict failed to uncover the source of the confusion. Accordingly, while the court has an affirmative duty to reconcile inconsistencies in a jury's verdict when possible, there is not, in the court's opinion, any principled basis upon which do so in this instance.

Because the jury's answers to the interrogatories and the general verdict are inconsistent the court cannot enter judgment on the jury's general verdict as requested by defendants Deeb and Mashie. *See Turchio v. D/S/A Den Norske Africa,* 509 F.2d 101, 106 (2d Cir. 1974) ("once the jury gives answers to interrogatories that are inconsistent with its verdict, judgment may not be entered upon the latter").

2. *Internal Consistency of the Jury's Answers to Interrogatories*

Under Rule 49(b), a necessary prerequisite for the entry of judgment on the jury's answers to interrogatories, notwithstanding the general verdict is that the jury's answers are consistent with each other. As noted, prior to the discharge of the jury none of the parties raised any inconsistencies in the jury's interrogatory responses. In their post-trial motions, however, Deeb, Mashie, and Abou-Khadra raise several apparent inconsistencies in the jury's answers. The Bseirani parties contend that because the consistency of the jury's answers was not challenged before the jury was discharged such objection has been waived. Although some courts have adopted a strict waiver analysis, *see, e.g., City of Richmond v. Madison Management Group Inc.,* 918 F.2d 438, 458 n.20 (4th Cir. 1990); *Lockard v. Missouri Pacific Railroad Co.,* 894 F.2d 299, 304 (8th Cir.), *cert. denied,* 111 S. Ct. 134, 135 (1990); *Strauss v. Stratojac Corp.,* 810 F.2d 679, 682-84 (7th Cir. 1987), the Second Circuit appears to

have rejected such an approach. *See Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629 (2d Cir. 1986).[5] In *Schaafsma*, the defendant moved after trial to set aside a portion of the jury's verdict on the grounds that the jury's answers to interrogatories were inconsistent. No objection to the jury's answers was made prior to the jury's discharge. The district court denied the motion. on appeal, the Second Circuit first noted that when the answers to interrogatories are internally inconsistent and also inconsistent with the general verdict, Rule 49(b) gives the court only two options, i.e., return the jury for further consideration or order a new trial. The court then held that "while a party's failure to object to such a double inconsistency carries some weight in our analysis on appeal . . . the terms of Rule 49(b) make it the 'responsibility of a trial judge to resolve the inconsistency' even when no objection is made." *Id.* at 634 (citations omitted). The Second Circuit then went on to consider the purported inconsistency and found that the jury's answers were not irreconcilable.[6] Accordingly, notwithstanding the failure of

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[5]One of the cases cited by the Bseirani parties in support of their contention that any inconsistencies in the jury's answers have been waived, *White v. Celotex Corporation*, 878 F.2d 144, 146 (4th Cir.), *cert. denied*, 110 S. Ct. 406 (1989), cited *Schaafsma* as an example of those few cases which have not followed the majority of circuits in adopting a strict waiver rule.

[6]This court acknowledges that a question left opened by the Second Circuit in *Schaafsma* is whether a party's failure to object prior to the jury's discharge precludes the later assertion of inconsistent answers if the jury's answers cannot be reconciled. The court interprets the Second Circuit's statement in *Schaafsma* that "a party's failure to object to such a double inconsistency *carries some weight in our analysis on appeal*," 802 F.2d at 634 (emphasis added), to indicate that the Second Circuit would adopt a waiver rule if the jury's answers cannot be reconciled.

the parties to raise inconsistencies in the jury's answers prior to the discharge of the jury, under the reasoning of *Schaafsma* this court has an affirmative duty to attempt to reconcile any inconsistencies in its answers.

a) *RICO*

Bseirani pleaded four separate RICO claims against Abou-Khadra, Deeb, and Mashie. First, Bseirani claimed that Abou-Khadra conducted the affairs of CSE through a pattern of racketeering and Deeb and Mashie conspired with him in violation of 18 U.S.C. § 1962(c) & (d). The jury found against Bseirani on this claim. (Interrogatories 18-20). Second, Bseirani alleged that Abou-Khadra acquired a 49% interest in SPPI from Bseirani through a pattern of racketeering and Deeb and Mashie conspired with him in violation of 18 U.S.C. § 1962(b) & (d). The jury found in favor of Bseirani on this claim. (Interrogatories 23-27). Bseirani's third RICO claim also was pleaded in relation to SPPI and sought to establish that Abou-Khadra, in conspiracy with Deeb and Mashie, conducted SPPI's affairs through a pattern of racketeering in violation of 18 U.S.C. § 1962(c) & (d). The jury found against Bseirani on this claim. (Interrogatories 28-29). Finally, the jury found in favor of Bseirani on his claim that Abou-Khadra conducted the overall business venture with Bseirani through a pattern of racketeering and Deeb and Mashie conspired with him in violation of 18 U.S.C. § 1962(c) & (d). (Interrogatories 32-34).

Abou-Khadra contends that the jury's verdict with regard to the two RICO claims asserted in relation to SPPI was inconsistent in that the jury found in Interrogatory 24 that SPPI was engaged in activities affecting interstate commerce through a pattern of racketeering yet in Interrogatory

28 found that Abou-Khadra did not conduct the affairs of SPPI through a pattern of racketeering. In the court's opinion there is no inconsistency in the jury's answers to these interrogatories. Interrogatories 24 and 28 questioned the jury about different RICO violations.

Interrogatory 24 was directed at section 1962(b) which makes it unlawful for a person to acquire or maintain an interest in an enterprise through a pattern of racketeering. Interrogatory 28, however, sought to establish a violation of section 1962(c) which prohibits a person from conducting the affairs of an enterprise through a pattern of racketeering. Based upon the evidence presented during the trial, the jury reasonably could have found that Abou-Khadra acquired from Bseirani a 49% interest in SPPI through a pattern of racketeering yet did not generally conduct the affairs of SPPI through a pattern of racketeering.

Defendant Deeb also challenges the consistency of the jury's RICO findings. Deeb argues that the jury's finding that Abou-Khadra conducted the Abou-Khadra/Bseirani business venture through a pattern of racketeering and that Deeb and Mashie conspired with him (Interrogatories 32-34) is inconsistent with the jury's finding that Abou-Khadra did not conduct either CSE or SPPI through a pattern of racketeering (Interrogatories 19, 20, 28, & 29). The court again has little difficulty in reconciling the jury's answers in this regard. The jury reasonably could have found that while Abou-Khadra did not conduct the affairs of CSE or SPPI, as individual entities, through a pattern of racketeering he did conduct his overall business dealings with Bseirani, including the operation of CSE and SPPI, through a pattern of racketeering.

Accordingly, the court holds that there is no inconsistency in the jury's answers to interrogatories regarding Bseirani's RICO claims.

b) *The March 7, 1984 General Release*

In Interrogatory 58 the jury found that on March 7, 1984, Abou-Khadra agreed to pay Bseirani and his corporations the sum of $1,600,000. In Interrogatory 63 the jury found that Abou-Khadra breached the agreement and proximately caused Bseirani $1,000,000 in damages. Abou-Khadra, Deeb, and Mashie argue that by awarding $1,000,000 in damages the jury must have found that the general release agreement was valid. Because Bseirani claimed that the release was invalid and sought damages pursuant to the general release only as an alternative cause of action, it is asserted that it was inconsistent for the jury to award any damages on the Bseirani parties' other claims because the general release agreement purported to exonerate Abou-Khadra from all liability arising out of his business dealings with Bseirani.

At first blush it would appear that the jury's award of damages to Bseirani on the general release claim is inconsistent with the jury's award of damages on Bseirani's other claims. Upon closer examination, however, the alleged inconsistency is illusory. Although the Bseirani parties admittedly pleaded the general release as an alternative theory of relief, Abou-Khadra never pleaded the general release as an affirmative defense to Bseirani's counterclaims. The court expressly instructed the jury in this regard as follows:

> You have also heard testimony in this action that a second agreement, also dated March 7, 1984 (Exhibit AGB-AT) was entered into between Ismail Abou-Khadra and Abdallah G. Bseirani. During some of the testimony that document has been referred to as a general release, and you have heard certain explana-

> tions concerning the legal effects of a general release.
>
> I charge you that the Abou-Khadra parties have not claimed, as part of this lawsuit, that Mr. Bseirani is barred by virtue of that agreement, dated March 7, 1984, from pursuing any claims against Mr. Abou-Khadra or his companies arising prior to March 7, 1984, and you are not to consider that document as a bar to those claims.

Because the general release was not pleaded as a defense and the jury was so instructed, it was not inconsistent for the jury to conclude that the general release was valid and to award damages based upon its breach and also to award damages to Bseirani on his other claims against Abou-Khadra.[7]

3. *Summary of Rule 49(b) Motions*

Because the jury's answers to interrogatories are consistent with each other but inconsistent with the general verdict, the Bseirani parties, motion to enter judgment under Rule 49(b) is granted. Therefore, the court directs the clerk of the court to enter judgment in 85-CV-1337 on the jury's answers which awarded compensatory damages against Deeb and Mashie, notwithstanding the general verdict. Given this determination the jury's verdict awarding punitive damages against Deeb and Mashie is not inconsistent.

[7]Even if the court were to agree that the jury's answers in this regard are inconsistent and cannot be reconciled, under this court's interpretation of the Second Circuit's opinion in *Schaafsma, see supra* at note 6, this inconsistency has been waived because it was not raised prior to the discharge of the jury.

B. *Rule 50(b) Motions*

The Abou-Khadra parties, Deeb, and Mashie move pursuant to Rule 50(b) for judgment n.o.v. or in the alternative for a new trial. Because judgment n.o.v. intrudes upon the jury's historic function, the standard for granting such relief has been characterized as "appropriately strict." *Stubbs v. Dudley,* 849 F.2d 83, 85 (2d Cir. 1988), *cert. denied,* 489 U.S. 1034 (1989). A motion for judgment n.o.v. is properly granted if, without considering the credibility of witnesses or weighing the evidence, a reasonable jury only could have reached the opposite result. *See Carvel Corp. v. Diversified Management Group, Inc.,* 930 F.2d 228, 232 (2d Cir. 1991); *County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1311 (2d Cir. 1990). Although the standard for a new trial is less stringent, such relief should be granted only when it is apparent "that the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice." *Katara v. D.E. Jones Commodities, Inc.,* 835 F.2d 966, 970 (2d Cir. 1987).

The court has carefully considered the arguments asserted in support of the Rule 50(b) motions and finds them to be without merit. In particular, the court has evaluated the sufficiency of the evidence with regard to Bseirani's claims for an accounting, fraud, conspiracy to defraud, RICO, unjust enrichment, conversion, and breach of the duty of honesty and fair dealing. The court also has considered the adequacy of the proof regarding punitive damages. Finally, the court has examined Abou-Khadra and Deeb's arguments

regarding the statute of frauds.[8] In sum, the court concludes that each of the jury's findings of liability and awards of compensatory and punitive damages were reasonable in light of all the evidence presented during the trial. Accordingly, the motions by Abou-Khadra, Deeb, and Mashie for judgment n.o.v. or alternatively for a new trial are denied.

C. *Bseirani Parties' Other Motions*

The court next considers the Bseirani parties' other motions related to the specific monetary amounts that this court should include in the entry of judgment in their favor. In particular, the Bseirani parties request the following relief: (1) treble damages on the RICO verdict; (2) prejudgment interest on those claims for which the jury found liability; (3) additional compensatory damages against defendant Mashie based upon the jury's finding that he breached his fiduciary duty as escrow agent; (4) sanctions against defendant Mashie, and (5) costs.[9]

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[8]At oral argument counsel for Abou-Khadra indicated that his argument with regard to the statute of frauds was made with "tongue-in-cheek." If by characterizing his argument as "tongue and cheek" he was suggesting that it was without any legal basis, the court must reproach counsel for his cavalier attitude. This court does not have the luxury or the desire to sift through legal memoranda only to be informed later by counsel that the position advanced should not be taken seriously. Certainly, the Bseirani parties took his argument seriously as they devoted substantial portions of their legal memoranda to refuting his assertions. In the future, counsel would be well-advised to save his "tongue-in-cheek" arguments for a more appropriate and receptive audience.

[9]The court has not received any opposition to these motions.

1. *Treble Damages under RICO*

18 U.S.C. § 1964(c) provides in relevant portion that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter . . . shall recover threefold the damages he sustains . . . ." Thus, once RICO liability has been established, the statute requires the trebling of any damage award. *Cullen v. Margiotta*, 811 F.2d 698, 713 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *MDO Developing Corp.*, 735 F. Supp. 591, 593 (S.D.N.Y. 1990). As noted earlier in this opinion, the jury found liability against Abou-Khadra, Deeb, and Mashie on two of the four RICO claims asserted by the Bseirani parties. On both of these claims the jury determined that the amount of damage that Bseirani suffered as a result was included in the amount of damages that the jury awarded to Bseirani on his SPPI accounting claim against Abou-Khadra, i.e., $1,930,500. The Bseirani parties are therefore entitled to total compensatory damages in the amount of $5,791,500 on their RICO claims against Abou-Khadra, Deeb, and Mashie.

2. *Prejudgment Interest*

The Bseirani parties next move for prejudgment interest on the jury's award of compensatory and punitive damages on their common law and RICO claims. The Bseirani parties' motion for an award of prejudgment interest on their common law claims is governed by New York Civil Practice Law & Rules ("CPLR") §§ 5001-5004. *See United States Naval Institute v. Charter Communications, Inc.*, 90-7749, -7795, slip op. 5347, 5360 (2d Cir. June 18, 1991); *Lewis v. S.L. & E., Inc.*, 831 F.2d 37, 39 (2d Cir. 1987). The CPLR authorizes the recovery of interest upon an award of damages (1) from the accrual of the cause of action to the date of

the verdict, report, or decision, section 5001; (2) from the date of the verdict, report, or decision to the entry of judgment, section 5002; and (3) from the date of the entry of judgment until payment, section 5003. A party who has been awarded a sum of money in an action at law based upon breach of performance of a contract or for property loss is entitled to recover interest as a matter of right. CPLR § 5001(a); *see Hilord Chemical Corp. v. Ricoh Electronics, Inc.*, 875 F.2d 32, 39 (2d Cir. 1989). If a sum of money was awarded pursuant to an equitable cause of action, the decision whether to award preverdict interest is within the court's discretion. CPLR § 5001(a). Preverdict interest is calculated "from the earliest ascertainable date the cause of action existed" to the date of the verdict, report, or decision. CPLR §§ 5001(b) & (c). Causes of action accruing after June 25, 1981, as in the present case, are governed by an interest rate of 9% per annum. CPLR § 5004. Finally, where there has been an award of punitive damages, interest is calculated from the date of the verdict, report, or decision to the date of the entry of judgment. *Delulio v. 320-57 Corp.*, 99 A.D.2d 253, 472 N.Y.S.2d 379, 381 (1st Dep't 1984).

In accordance with the above principles, the court hereby directs the clerk of the court to award the Bseirani parties interest at a rate of 9% per annum on each of the common law claims in which the jury awarded compensatory and punitive damages. With regard to the award of compensatory damages, interest shall be computed from the date the jury found that each cause of action accrued, as indicated in its answers to the interrogatories, to the date of the entry of judgment. As to the award of punitive damages, interest shall be computed from the date of the jury's verdict awarding punitive damages to the date of the entry of judgment. The Bseirani parties also are entitled to recover interest at a

rate of 9% per annum from the date of the entry of judgment until the date the judgment is satisfied.

The Bseirani parties also seek prejudgment interest on the jury's award of damages on the RICO claims. The Bseirani parties propose that the court award interest at a rate of 9% per annum on the jury's award of $1,930,500 on the two meritorious RICO claims. By their calculations the prejudgment interest would amount to $3,902,836.29, which when added to the principal verdict would total $5,833,836.29. This amount, they contend, should then be trebled under 18 U.S.C. § 1964(c).

Federal law does not specifically provide for the award of preverdict or prejudgment interest. *Cf.* 28 U.S.C. § 1961(a) (authorizing *post*judgment interest on money judgments obtained in a federal district court). The award of such interest in the absence of express statutory authorization is generally understood to be within the district court's discretion. *Cf. E.E.O.C. v. County of Erie,* 751 F.2d 79, 81 (2d Cir. 1984). The purpose of awarding preverdict and prejudgment interest is to compensate an aggrieved party for the loss of the use of money. *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.,* 697 F.2d 481, 484-85 (2d Cir. 1983). Because the court is satisfied that its award of treble damages on the Bseirani parties' RICO claims is adequate to compensate them for the loss of the use of their money, the court declines to award prejudgment interest on the RICO damage awards. *See Louisiana Power and Light Co. v. United Gas Pipe Line Co.,* 642 F. Supp. 781, 811 (E.D. La. 1986) (refusing to award prejudgment interest on the plaintiff's RICO claim).

3. *Compensatory Damages Against Mashie*

In interrogatory 66 the jury found that defendant Mashie breached his duty as an escrow agent by wrongfully withholding two checks totaling $1,000,000 held in escrow pursuant to the March 7, 1984 agreement between Abou-Khadra and Bseirani. The jury found that this breach occurred October 6, 1984. Based upon a pre-trial stipulation between the parties it was agreed that the question of the amount of compensatory damages, if any, flowing from Mashie's conduct would be submitted to the court. The Bseirani parties presently seek an award of $12,691.15 in compensatory damages against Mashie.

The Bseirani parties contend that although Mashie ultimately turned over the two checks to the clerk of the court, and the cash equivalent of the checks has been earning interest for some time, additional damages were caused as a result of Mashie's breach of his duty. The damages presently sought are limited to the attorney's fees and costs which were incurred in the course of the Bseirani parties' efforts to obtain legally valid replacement checks for the escrowed checks that Mashie surrendered to the clerk of the court.[10]

Briefly, those efforts occurred during the course of the following events. As of the fall of 1985, the account upon which Abou-Khadra issued the two escrowed checks no longer had sufficient funds to cover payment of the checks.

[10]The Bseirani parties do not currently seek to recover attorney's fees and costs incurred in connection with their efforts to compel Mashie to turn over the checks held in escrow. *See* Memorandum of Law in Support of Compensatory Damages, Doc. 205 (213), at 5-6. They explain that because they were successful on two of their RICO claims, they will seek recovery of all their attorney's fees and costs under 18 U.S.C. § 1964(c). *Id.* at 6 n.2.

On October 31, 1985, Abou-Khadra agreed to convey to the clerk of the court one or more replacement checks totaling $1,133,643 dated July 2, 1986, to be cashed on or after that date unless payment of $1 million plus interest was received by the clerk before July 1, 1986. Subsequently, in November of 1985 Abou-Khadra submitted the required check to the clerk. Bseirani raised concerns about the check's validity and consequently a second check was issued on January 13, 1986. Bseirani raised additional concerns about this check, namely, that it was not consistent with Saudi banking laws. Thus, a third check was issued in the form of a cashier's check from the Merchant's Bank and Trust Company of Syracuse on April 24, 1986. This court subsequently issued an order on July 7, 1986 directing the clerk of the court to cash the check, place the proceeds in an interest bearing account, and return the check dated July 2, 1986.

In response, Mashie argues that there was no evidence presented during the trial indicating that, in acting as escrow agent, he was guaranteeing the validity of the checks. Rather, his only obligation, he contends, was to turn over the checks issued by Abou-Khadra on March 7, 1984. Because there is no proof that the checks were negotiable as of the date Mr. Mashie was required to turn over the checks, defendant contends that the Bseirani parties have failed to demonstrate that the attorney's fees and costs incurred in obtaining replacement checks that could be cashed were proximately caused by his conduct.

The court does not question the Bseirani parties' assertion that they incurred additional attorney's fees and costs as a result of their efforts to obtain legally valid replacement checks that could be cashed. Nor does the court question the reasonableness of the total amount expended. The fundamental question presented is whether these fees and costs

are attributable to defendant Mashie's breach of his fiduciary duty in withholding the escrowed checks. Based upon the trial proof and the post-trial submissions, the court concludes that the Bseirani parties have failed to demonstrate by a preponderance of the evidence that the additional compensatory damages sought were proximately caused by defendant Mashie's breach of his fiduciary duty as escrow agent.

As noted, the jury found that defendant Mashie breached his fiduciary duty on October 6, 1984. If there was evidence in the record indicating that, had Mashie turned the escrowed checks over on their due dates they could have been cashed, the court would agree that Mr. Mashie's failure to do so proximately caused the damages that the Bseirani parties presently seek. The Bseirani parties, however, have not offered any evidence indicating that this was the case. The determination that replacement checks had to be procured appears to have been prompted by the discovery that the accounts upon which the checks were drawn did not, as of October 17, 1985, have sufficient funds to permit the checks to be cashed. It is unclear whether this same account as of the date of the breach contained sufficient funds to cover the checks. In the absence of such evidence it is uncertain whether the fees and costs incurred by the Bseirani parties would have been expended irrespective of Mashie's conduct. For this reason, the Bseirani parties' motion for additional compensatory damages against defendant Mashie is denied.

4. *Discovery Sanctions against Mashie*

The Bseirani parties next move for the imposition of sanctions in the amount of $3,121.60 against defendant Mashie in connection with a discovery dispute that arose in

1987. The Bseirani parties state that in 1987 Mr. Mashie refused to produce certain documents and a motion to find him in contempt was made. on April 9, 1987, the court ruled against Mr. Mashie and directed him to pay the Bseirani parties' expenses and attorney's fees in bringing the motion. The Bseirani parties contend that although they subsequently submitted material to the court indicating that the total fees and costs incurred were $3,121.60, the court has yet to issue an order on this matter.

In an order dated April 9, 1987, the court concluded that all the expenses incurred as a result of the discovery dispute were the result of Mr. Mashie's "unreasonable recalcitrance" and directed the law firms of Hancock & Estabrook and Armani, Fitzpatrick, Snyder & Armani to submit to Mr. Mashie an itemized statement of expenses incurred. The court further instructed that unless Mr. Mashie filed reasonable objections within ten days of his receipt of the statements he was to pay the amount sought. The court's file indicates that itemized statements were submitted to Mashie, who filed objections to the amounts requested. Thereafter, the Bseirani parties made a motion on June 22, 1987 for an order quantifying the amount of expenses they were entitled to recover. The file also indicates that on September 4, 1987 this court signed an order submitted by the Bseirani parties in connection with their June 22, 1987 motion in which the court ordered Mr. Mashie to pay the firm of Hancock & Estabrook $3,121.60 as costs resulting from the necessity of bringing on the contempt motion. Accordingly, contrary to the Bseirani parties' contention this matter has been decided by the court. To the extent Mr. Mashie has yet to pay this sanction he is directed to do so immediately.

5. *Costs*

Finally, pursuant to Fed.R.Civ.P. 54(d) and 28 U.S.C. § 1920 the Bseirani parties request an award of costs in the amount of $15,500. After review of the Bill of Costs submitted by the Bseirani parties, the court concludes that the amount of costs requested is reasonable and appropriate. Such costs therefore shall be included in the final judgment entered by this court.

III. CONCLUSION

In sum, the Abou-Khadra parties' motion for judgment n.o.v. or a new trial in 84-CV-1502 is denied; defendants Deeb and Mashie's motions for the entry of judgment on the jury's general verdict of no compensatory damages and to set aside the jury's award of punitive damages in 85-CV-1337 are denied; defendants Deeb and Mashie's motions for judgment n.o.v. or a new trial in 85-CV-1337 are denied; the Bseirani parties' motion for the entry of judgment on the jury's answers to interrogatories, notwithstanding the general verdict is granted; and the Bseirani parties motion for additional compensatory damages against defendant Mashie is denied.

Pursuant to Fed.R.Civ.P. 58, the court hereby orders the Bseirani parties to submit to the clerk of the court a form of judgment consistent with the foregoing opinion. Upon receipt of the form of judgment and approval by the court, final judgment shall be entered by the clerk of the court forthwith.

It is So Ordered.

Dated: July 11, 1991
Syracuse, New York

s/HOWARD G. MUNSON
HOWARD G. MUNSON
Senior United States District Judge

U.S. District Court
N.D. of N.Y.
Filed July 12, 1991
George A. Ray, Clerk
Syracuse

APPENDIX G—Excerpt from Trial Transcript Reflecting Jury's Responses to Special Interrogatories

(17) The Court: All right. Thank you, ladies and gentlemen.

(WHEREUPON, the jury leaves the courtroom and the following occurred.)

The Court: Any problem with what I said to the jury, Mr. Fitzpatrick?

Mr. Fitzpatrick: None, Your Honor.

The Court: Mr. Love?

Mr. Love: No, Your Honor.

The Court: Mr. Peebles?

Mr. Peebles: No, Your Honor.

The Court: Mr. Lantier?

Mr. Lantier: No, Your Honor.

The Court: All right. Thank you.

Court Clerk: Court stands recessed.

(WHEREUPON a recess was taken.)

(WHEREUPON the following occurred in open court in the presence of the jury.)

The Court: Mr. Fallon, you are the foreperson of this jury?

Juror 3: Yes, sir.

The Court: I have a note from you that you have reached a verdict.

(18) Juror 3: Yes, sir.

The Court: All right. Let me read the questions to you and you tell me how the verdict is found.

With regard to I, No. 1, do Abdallah G. Bseirani, AGB International Management Corporation, and/or Pittcon owe any monies to Ismail Abou-Khadra and/or CSE as a result of business dealings under the parties' CSE agreement? Yes or no?

Juror 3: No.

The Court: So say you all?

As to the Bseirani Parties' Claims, Question No. 4: Do Ismail Abou-Khadra and/or CSE owe any monies to Abdallah G. Bseirani as a result of business dealings under the parties' CSE Agreement? Yes or no?

Juror 3: Yes.

The Court: If your answer to Interrogatory No. 4 is "yes", how much money do you find is due and owing?

Juror 3: $950,000 U.S.

The Court: All right. If your answer to No. 4 is "yes", from what date do you find such money is due and owing?

Juror 3: 12/19/83.

(19) The Court: All right. Under II, Question No. 7: Do Ismail Abou-Khadra and/or SPPI owe any monies to Abdallah G. Bseirani as a result of business dealings in connection with SPPI? Yes or no?

Juror 3: Yes.

The Court: If your answer to Interrogatory No. 7 is "yes", how much money do you find is due and owing?

Juror 3: $1,930,500 U.S.

The Court: $1,930,500?

Juror 3: Correct.

The Court: If your answer to Interrogatory No. 7 is "yes", from what date do you find such money is due and owing?

Juror 3: 12/19/83.

The Court: Under III: Did Ismail Abou-Khadra, Tony Deeb, and George Mahshie, or any of them, defraud Ab-

dallah G. Bseirani into believing that he was the true, *de facto,* owner of CSE? Answer: Ismail Abou-Khadra?

Juror 3: Yes.

The Court: Tony Deeb?

Juror 3: Yes.

The Court: George Mahshie?

(20) Juror 3: Yes.

The Court: If your answer to Interrogatory No. 10, the one that I just presented to you, is "yes", what amount of damages did Abdallah G. Bseirani suffer as a proximate result?

Juror 3: We say that those amounts are included in II, line 8, in other words, the $1,930,500.

The Court: The same as Question No. 8 then?

Juror 3: Correct.

The Court: If your answer to Interrogatory 10 is "yes", on what date do you find such damages were first suffered?

Juror 3: 12/19/83.

The Court: The same as No. 9?

Juror 3: Correct.

The Court: Question No. 13 do you find that Abdallah G. Bseirani is entitled to punitive damages as a result of the finding of fraud?

Juror 3: Yes.

The Court: Question No. 14: Did Ismail Abou-Khadra, Tony Deeb, and George Mahshie, or any of them conspire to defraud Abdallah G. Bseirani into believing that he was the true, *de facto,* owner (21) of CSE? Ismail Abou-Khadra?

Juror 3: Yes.

The Court: Tony Deeb?

Juror 3: Yes.

The Court: George Mahshie?

Juror 3: Yes.

The Court: Question 15: If your answer to Interrogatory No. 14 is "yes," what amount of damages did Abdallah G. Bseirani suffer as a proximate result?

Juror 3: It is included in Item 8.

The Court: All right. The same date as 9. So 16 would be the same date as 9.

Juror 3: Correct.

The Court: Seventeen: Do you find that Abdallah G. Bseirani is entitled to punitive damages as a result of a finding of conspiracy to defraud?

Juror 3: Yes.

The Court: IV, RICO. Do you find that CSE constituted an enterprise as the term is defined under RICO?

Juror 3: Yes.

The Court: Question 19: If your answer to the foregoing interrogatory is "yes", do (22) you find that Ismail Abou-Khadra conducted the operation of SCE, an enterprise engaged in interstate or foreign commerce, and whose activities affected interstate or foreign commerce, through a pattern of racketeering activity?

Juror 3: No.

The Court: All right. Then, gentlemen, I guess we go to Interrogatory 23.

Mr. Fitzpatrick: Yes.

The Court: Do you find that SPPI constituted an enterprise as that term is defined under RICO?

Juror 3: Yes.

The Court: If your answer to Question No. 24, if your answer to the foregoing interrogatory is "yes" do you find that Ismail Abou-Khadra acquired from Bseirani a 49% interest in the operation of SPPI, an enterprise engaged in interstate or foreign commerce, and whose activities affected interstate or foreign commerce, through a pattern of racketeering activity?

Juror: Yes.

The Court: Question 25: Did Tony Deeb, George T. Mahshie, and/or others conspire with Ismail Abou-Khadra to acquire from Bseirani a 49% interest in the operation of SPPI, an enterprise engaged in interstate or foreign commerce, and whose activities affected interstate or foreign commerce through a pattern of racketeering activity? Tony Deeb?

Juror 3: Yes.

The Court: George Mahshie?

Juror 3: Yes.

The Court: Question 26: If your answer to either Interrogatory No. 24 or 25 is "yes," what amount of damages do you find that Abdallah G. Bseirani suffered as a proximate result thereof?

Juror 3: They were included in Item 8.

The Court: All right. And Question No. 27: If your answer to either Interrogatory 24 or 25 is "yes," on what date do you find that such damages were first suffered?

Juror 3: 2/16/82.

The Court: Question 28: Did Ismail Abou-Khadra to conduct the operation of SPPI, an enterprise engaged in interstate or foreign commerce, and whose activities affected interstate or foreign commerce, through a pattern of racketeering activity?

Juror 3: No.

(24) The Court: Question 29: Did Tony Deeb, George T. Mahshie, and/or others conspire Ismail Abou-Khadra to conduct the operation of SPPI, an enterprise engaged in interstate or foreign commerce, and whose activities affected interstate or foreign commerce, through a pattern of racketeering activity? Tony Deeb?

Juror 3: No.

The Court: George T. Mahshie?

Juror 3: No.

The Court: Question 32: Do you find that the overall business venture between Ismail Abou-Khadra and Abdallah G. Bseirani, including as it related to CSE and SPPI, constituted an enterprise as that term is defined under RICO?

Juror 3: Yes.

The Court: Question 33: If your answer to the foregoing interrogatory is "yes," do you find that Ismail Abou-Khadra conducted the operation of the Bseirani/Abou-Khadra business venture, an enterprise engaged in interstate or foreign commerce, and whose activities affected interstate or foreign commerce, through a pattern of racketeering activity?

Juror 3: Yes.

The Court: Question 34: Did (25) Tony Deeb, George T. Mahshie, and/or others conspire with Ismail Abou-Khadra to conduct the operation of the Bseirani/Abou-Khadra business venture, an enterprise engaged in interstate or foreign commerce, and whose activities affected interstate or foreign commerce, through a pattern of racketeering activity? Tony Deeb?

Juror 3: Yes.

The Court: George Mahshie?

Juror 3: Yes.

The Court: And Question 35:

If your answer to either Interrogatory No. 33 or 34 is "yes," what amount of damages do you find that Abdallah G. Bseirani suffered as a proximate result thereof?

Juror 3: Included in Item 8.

The Court: Question 36: If your answer to either Interrogatory No. 33 or 34 is "yes," on what date do you find that such damages were first suffered?

Juror 3: 12/19/83.

The Court: All right. V, Question 37: Did Ismail Abou-Khadra tortiously interfere with an employment contract between AGB International Management corporation and Ray Heller?

(26) Juror 3: Yes.

The Court: Question 38: If your answer to Interrogatory No. 37 is "yes," what amount of damages do you find were proximately caused by such conduct?

Juror 3: None.

The Court: Well, as to Question No. 39, then, you have no answer, is that correct?

Juror 3: Right.

The Court: 40: If your answer to Interrogatory No. 37 is "yes," do you find that AGB International Management Corporation is entitled to punitive damages as a result of such conduct?

Juror 3: Yes.

The Court: VI, Question 41: Do you find that SPPI, CSE and/or Ismail Abou-Khadra received and/or held funds, as trustee, for the benefit of Abdallah G. Bseirani?

Juror 3: No.

The Court: I guess we go to VII, Question 45: Do you find that Ismail Abou-Khadra, CSE and/or SPPI have wrongfully held money and property belonging to Abdallah G. Bseirani and have thereby been unjustly enriched?

Juror 3: Yes.

(27) The Court: 46: If your answer to Interrogatory No. 45 is "yes," set forth the amount upon which you find that they have been unjustly enriched.

Juror 3: $2,880,500 U.S.

The Court: Question 47: Of that amount, how much, if any, has been included in damages awarded to Abdallah G. Bseirani, Pittcon Preinsulated Pipes Corporation, and/or

AGB International Management Corporation under other causes of action?

Juror 3: $2,880.500.

The Court: Question 48: If your answer to Interrogatory No. 45 is "yes," on what date do you find that such damages were first suffered?

Juror 3: 12/19/83.

The Court: VIII, Question 49: Do you find that Ismail Abou-Khadra, SPPI and/or CSE wrongfully exercised dominion and control over monies belonging to Abdallah G. Bseirani and have refused to return those monies despite due demand?

Juror 3: Yes.

The Court: Question 50: If your answer to Interrogatory No. 49 is "yes," what damages do you find were suffered as a proximate result of the conversion?

(28) Juror 3: Same as Item 46.

The Court: 51: Of that amount, how much, if any, has been included in damages awarded to Abdallah G. Bseirani, Pittcon Preinsulated Pipes Corporation, and/or AGB International Management Corporation under other causes of action?

Juror 3: $2,880,500.

The Court: If your answer to—Question 52: If your answer to Interrogatory No. 49 is "yes," on what date do you find that such damages were first suffered?

Juror 3: 12/19/83.

The Court: Question 53: Do you find that Abdallah G. Bseirani, Pittcon Preinsulated Pipes Corporation and/or AGB International Corporation are entitled to recovery of punitive damages for the conversion?

Juror 3: Yes.

The Court: IX, Question 54: Do you find that Abdallah G. Bseirani expended money, invested time and effort, lent

technical expertise, and/or rendered services to Ismail Abou-Khadra, CSE and/or SPPI for which he has not been fairly compensated?

Juror 3: Yes.

The Court: Question 55; If your (29) answer to Interrogatory No. 54, is "yes," set forth the amount of the fair and reasonable value of those services, assistance, and property.

Juror 3: $250,000 U.S.

The Court: Question 56: Of that amount, how much, if any, has been included in damages awarded to Abdallah G. Bseirani, Pittcon Preinsulated Pipes Corporation, and/or AGB International Management Corporation under other causes of action?

Juror 3: None.

The Court: Question 57: If your answer to Interrogatory No. 54 if "yes," from what date do you find that Abdallah G. Bseirani was not compensated for such services, assistance, and property?

Juror 3: March, 1983.

The Court: X, Question 58: Do you find that on March 7, 1984, Ismail Abou-Khadra agreed to pay Abdallah G. Bseirani together with his corporations, Pittcon Preinsulated Pipes Corporation, and AGB International Management Corporation, the sum of $1,600,000?

Juror 3: Yes.

The Court: Question 59: Do you find that the two agreements signed on March 7, 1984, AGB-AT and AGB-AU, were related and that performance (30) of one of the agreements was conditioned upon performance under the other?

Juror 3: No.

The Court: Question 60: Do you find that Abdallah G. Bseirani violated the March 7, 1984, Commercial Agreement?

Juror 3: No.

The Court: Question 61, we don't need that, I guess.

Juror 3: No.

The Court: Question 62, I guess we don't need. In other words, you would have answered "no" to both 61 and 62.

Juror 3: That is right.

The Court: And 62 and 63.

Juror 3: Right.

The Court: X, Question 64—

Juror 3: Wait, 63, Your Honor.

The Court: I'm sorry, you are correct, 63: If you find that Ismail Abou-Khadra breached his contractual obligation to pay $1,600,000 without justification, what damages do you find were proximately caused to Abdallah G. Bseirani by that breach?

Juror 3: $1,000,000 U.S.

(31) Court: All right. Now, X, Question 64: Of that amount, how much, if any, has been included in damages awarded to Abdallah G. Bseirani, Pittcon Preinsulated Pipes Corporation, and/or AGB International Management Corporation under other causes of action?

Juror 3: None.

The Court: Question 65: Do you find that Abdallah G. Bseirani is entitled to recovery of punitive damages based upon breach of the March 7, 1984, agreement?

Juror 3: Yes.

The Court: Question 66: Do you find that George T. Mahshie breached his fiduciary duty as an escrow agent by wrongfully withholding two checks held in escrow by him under the March 7, 1984 escrow agreement in the total amount of $1,000,000 and failing to deliver them when and as required under the escrow agreement?

Juror 3: Yes.

The Court: Question 67: If your answer to Interrogatory No. 65 is "yes," on what date do you find that such breach occurred?

Juror 3: October 6, 1984.

The Court: Question 68: Do you (32) find that Abdallah G. Bseirani, AGB International Management Corporation and/or Pittcon Preinsulated Pipes Corporation are entitled to recovery of punitive damages for defendant Mahshie's breach of his duty as an escrow agent?

Juror 3: Yes.

The Court: Question 69: Do you find that the parties intended the January, 1982, September, 1982, and February, 1983, license/technical assistance agreements between Pittcon and SPPI to be binding and legally enforceable contracts to be carried out between the parties?

Juror 3: No.

The Court: So we don't need 70 or 71, is that correct?

Juror 3: That is correct. Nor 72.

The Court: Nor 72.

Juror 3: Nor 73.

The Court: Or 73 or 74.

Juror 3: No.

The Court: Well, did you answer Question 74?

Juror 3: No, we answered it "no".

The Court: Let me read it to (33) you so it is in the record: Do you find that Abdallah G. Bseirani and/or Pittcon Preinsulated Pipes Corporation are entitled to recovery of punitive damages for breach of the license/technical assistance agreements?

Juror 3: No.

The Court: All right. XII, Question 75: Do you find that at relevant times defendant Tony Deeb was a confidential employee and/or agent of Abdallah G. Bseirani, AGB International Management Corporation and/or Pittcon Preinsu-

lated Pipes Corporation, and if so that he breached a duty of loyalty and fair dealing toward Abdallah G. Bseirani, AGB International Management Corporation and/or Pittcon Preinsulated Pipes Corporation?

Juror 3: Yes.

The Court: Question 76: If your answer to the foregoing Interrogatory is "yes," state the amount of the damages which you find were proximately caused as a result of that breach.

Juror 3: $1,930,500 U.S.

The Court: If your answer to Interrogatory No. 75 is "yes," on what date did such breach occur?

Juror 3: February 16, 1982.

The Court: Question 78: Do you (34) find that Abdallah G. Bseirani, AGB International Management Corporation and/or Pittcon Preinsulated Pipes Corporation are entitled to recovery of punitive damages for breach of defendant Deeb's duty of loyalty and fair dealing?

Juror 3: Yes.

The Court: All right. XIV, Question 79: Do you find that George T. Mahshie wrongfully exercised ownership, dominion and/or control over two checks entrusted to him on or about March 7, 1984, in the total amount of $1,000,000, made payable to Abdallah G. Bseirani by refusing, without a lawful basis, to deliver those checks to Bseirani as required by the terms of the parties' escrow agreement?

Juror 3: Yes.

The Court: Question 80: If your answer to the foregoing interrogatory is "yes," state the amount of damages which you find were suffered as a proximate result of that conversion.

Juror 3: $1,000,000 U.S.

The Court: Question 81: Of that amount, how much, if any, has been included in damages awarded to Abdallah G.

Bseirani, Pittcon Preinsulated Pipes Corporation, and/or AGB International Management Corporation under other causes of action?

(35) Juror 3: $1,000,000 U.S.

The Court: And that would be under which cause of action? Are you going back to the answer to Question 63?

Juror 3: Yes.

The Court: Mr. Fallon, your answer is "yes"?

Juror 3: Yeah.

The Court: All right. If your answer to Interrogatory No. 78 is "yes," on what date do you find that such damages were first suffered?

Juror 3: October 6, 1984.

The Court: Question 83: Do you find that Abdallah G. Bseirani, AGB International Management Corporation and/or Pittcon Preinsulated Pipes Corporation are entitled to recovery of punitive damages for defendant Mahshie's conversion?

Juror 3: Yes.

The Court: XV, Question 84: Do you find that George T. Mahshie committed legal malpractice toward Abdallah G. Bseirani, Pittcon Preinsulated Pipes Corporation and/or AGB International Management Corporation?

Juror 3: Yes.

The Court: Question 85: If your (36) answer to Interrogatory No. 84 is "yes," state the amount of damages which you find were proximately caused by the malpractice.

Juror 3: $4,130,500 U.S.

The Court: Question 86: Of that amount, how much, if any, has been included in damages awarded to Abdallah G. Bseirani, Pittcon Preinsulated Pipes Corporation, and/or AGB International Management Corporation under other causes of action?

Juror 3: $4,130,500 U.S.

The Court: Question 87: If your answer to Interrogatory No. 84 is "yes," on what date do you find that such damages were first suffered?

Juror 3: March 16, 1979.

The Court: Question 88: Do you find that Abdallah G. Bseirani, AGB International Management Corporation and/or Pittcon Preinsulated Pipes Corporation are entitled to recovery of punitive damages for defendant Mahshie's malpractice?

Juror 3: Yes.

The Court: All right. Summary: Total damages to Ismail Abou-Khadra, CSE and SPPI on their claims in 84-CV-1501:

Juror 3: None.

The Court: Total compensatory (37) damages to Abdallah G. Bseirani, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation on their counterclaims in 84-CV-1502:

Juror 3: $4,130,500 U.S.

The Court: Total compensatory damages to Abdallah G. Bseirani, AGB International Management Corporation and Pittcon Preinsulated Pipes Corporation on their claims in 85-CV-1337:

Juror 3: Punitive damages only.

The Court: All right. Thank you. Now, let me inquire, we have gone through all of those questions. Mrs. Gaworecki, you have heard what your foreman said about all of those questions, did you vote the same way as your foreman did—

Juror 1: Yes, I did.

The Court: As stated to the Court?

Juror 1: Yes, I did.

The Court: Is there any difference in what your answers would have been to any of those questions to the Court at this time?

Juror 1: No.

The Court: Mrs. Hdeldtke, any difference in what your answers would have been to what Mr. Fallon just said the jury's findings were in this case?

(38) Juror 2: No.

The Court: Mr. Akers, any difference in what you would have said had I asked you all the questions?

Juror 4: No.

The Court: All right. Miss Foster, would your answers be any different than Mr. Fallon's were when I read the questions to Mr. Fallon?

Juror 5: No.

The Court: The answer is no?

Juror 5: No.

The Court: Miss Kelly, would your answers be any different than those that were given by Mr. Fallon to all of the questions that I asked him regarding the jury verdict?

Juror 6: No.

The Court: Mrs. Rombough, would your answers be any different than the answers that Mr. Fallon gave to the Jury Verdict Form questions that I read to him?

Juror 7: No, Your Honor.

The Court: Mr. Smardon, would your answers have been any different than the answers that Mr. Fallon gave to all of the questions that I read to him during the course of asking him what (39) the jury verdict was?

Juror 8: No, sir.

The Court: All right. So all of you agree with what Mr. Fallon said? Any dissent at all on any of the questions? All right. I'm sorry, but I am going to have to ask you to step down for a few moments.

(WHEREUPON, the jury left the courtroom and the following occurred.)